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NO. 57253-9-I

COURT OF APPEALS FOR DIVISION I
STATE OF WASHINGTON

CITY OF ARLINGTON, DWAYNE LANE, and SNOHOMISH COUNTY,

Appellants,

v.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD, STATE OF WASHINGTON; 1000 FRIENDS OF WASHINGTON nka FUTUREWISE; STILLAGUAMISH FLOOD CONTROL DISTRICT; PILCHUCK AUDUBON SOCIETY; THE DIRECTOR OF THE STATE OF WASHINGTON DEPARTMENT OF COMMUNITY, TRADE AND ECONOMIC DEVELOPMENT; and AGRICULTURE FOR TOMORROW,

Respondents.

RESPONSE BRIEF OF THE DIRECTOR OF THE STATE OF WASHINGTON DEPARTMENT OF COMMUNITY, TRADE AND ECONOMIC DEVELOPMENT

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I. INTRODUCTION

The "Island Crossing area" is located northwest of the City of Arlington, east of Interstate 5, in Snohomish County. The record before the Growth Management Hearings Board (Board) shows that it lies entirely within the 100-year floodplain of the Stillaguamish River, is composed of prime agricultural soils, and is of long-term commercial significance for the agricultural industry in the Stillaguamish River Valley and Snohomish County. Apart from three attempts to re-designate the Island Crossing area for urban uses, most of the Island Crossing area has been designated and zoned agricultural since 1978.

This appeal involves the two most recent instances in which Snohomish County adopted an ordinance to expand the Arlington Urban Growth Area to include the Island Crossing area. In both instances, the Board found the ordinance violated the Growth Management Act (GMA), RCW 36.70A, and was clearly erroneous. In both instances, the Board then determined the ordinance substantially interfered with the GMA's goals and issued a determination of invalidity under RCW 36.70A.302. Following the second invalidation, former Governor Locke imposed economic sanctions on the County under RCW 36.70A.340, which were lifted only after the County adopted a resolution clarifying that none of the ordinances that violated the GMA remained in effect.

The County and its supporters maintain this case is about changing circumstances at Island Crossing, circumstances that now make the area unsuitable for long-term agricultural production. The record, however, does not support their argument that circumstances have changed. Based on the evidence in the record, the Board properly concluded the expansion of the Arlington UGA to include Island Crossing and the re-designation of Island Crossing from agriculture to commercial urban development did not comply with the goals and requirements of the GMA and was clearly erroneous.

The County and its supporters also contend the Board did not properly defer to the County's implementation of the GMA. We respectfully disagree. The GMA provides for deference to County actions that are not clearly erroneous. *Quadrant Corp. v. Growth Mgmt. Hrgs. Bd.*, 154 Wn.2d 224, 238, ¶ 23, 110 P.3d 1132 (2005). Here, however, the Board applied the correct legal standard to the record in determining whether the two ordinances complied with the GMA, concluded they were not in compliance and were clearly erroneous, and the conclusions are supported by the evidence in the record. Consequently, the County's actions are not entitled to deference. *Id.*, 154 Wn.2d at 238, ¶ 23 (deference to the local government ends when it is shown that a local government's action is a clearly erroneous application of the GMA).

This brief is filed by the Director of the Washington State Department of Community, Trade and Economic Development (CTED). CTED was a Petitioner in the proceedings before the Board. To avoid repetition, this Brief joins in and incorporates certain specified arguments presented by other Petitioners, rather than setting them forth herein.

II. FACTUAL AND PROCEDURAL HISTORY

Only two orders of the Board have been challenged in this appeal, but an understanding of the broader factual and procedural history of this case is essential to an informed decision by this Court.

A. The Prior Ordinances (Not Challenged in This Appeal)

In 1995, Snohomish County adopted an ordinance to expand the Arlington Urban Growth Area (UGA) to include the Island Crossing area. Although the Board initially upheld the ordinance on review, the Board's order was reversed by Snohomish County Superior Court.[1]

On remand, the County re-designated Island Crossing as agricultural land and removed it from the Arlington UGA. Mr. Dwayne Lane (an appellant in this appeal) then appealed the removal of Island Crossing from the Arlington UGA; the Board dismissed his petition for

[1] *Snohomish Cy. v. Cent. Puget Sound Growth Mgmt. Hrgs. Bd.*, Snohomish Cy. Superior Ct. Cause No. 96-2-03675-5 (judgment entered Nov. 19, 1997).

review. Snohomish County Superior Court[2] and this Court[3] both affirmed the Board.

B. Snohomish County Amended Ordinance No. 03-063 and the Board's Final Decision and Order (At Issue in This Appeal)

In 2003, Snohomish County adopted Ordinance 03-063, which again expanded the Arlington UGA to include Island Crossing. The ordinance amended the County's Comprehensive Plan to add 110.5 acres in Island Crossing to the Arlington UGA, changed the designation of that land from "Riverway" Commercial Farmland (75.5 acres) and "Rural Freeway Service" (35 acres) to "Urban Commercial," and rezoned the land from "Rural Freeway Service" and "Agriculture-10 Acres" to "General Commercial."[4]

Like the 1995 ordinance that preceded it, Ordinance 03-063 was challenged as noncompliant with the GMA. The history of the prior

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[2] *Lane v. Cent. Puget Sound Growth Mgmt. Hrgs. Bd.,* Snohomish Cy. Superior Ct. Cause No. 99-2-03528-1 (judgment entered May 26, 2000).

[3] *Lane v. Cent. Puget Sound Growth Mgmt. Hrgs. Bd.*, 2001 WL 244384 (Wash. App. Div. I, Mar. 12, 2001). This Court's decision is unpublished. It is not cited here as precedent, but solely to provide history and context, since it involved a previous effort by Snohomish County to expand the Arlington UGA to include the same land addressed by the two ordinances at issue in the present appeal. An unpublished Court of Appeals decision may be cited as evidence of the facts established in an earlier proceeding in the same case or in a different case involving the same parties. *State v. Nolan*, 98 Wn. App. 75, 78 n.1, 988 P.2d 473 (1999), *affirmed*, 141 Wn.2d 620, 8 P.3d 300 (2000). For the Court's convenience, a copy of the *Lane* decision is attached as **Appendix A.**

[4] *1000 Friends of Wash., et al. v. Snohomish Cy.*, CPSGMHB No. 03-3-0019c, Corrected Final Decision and Order at 1-2 (Mar. 22, 2004) (CP vol. XIII, pp. 2562-63). For the Court's convenience, a copy of Ordinance 03-063 (CP vol. IV, pp. 692-707) is attached as **Appendix B**, and a copy of the Corrected Final Decision and Order (Corrected FDO) (CP vol. XIII, pp. 2562-2602) is attached as **Appendix C**.

litigation was presented to the Board as part of the record for Ordinance 03-063. Referencing the prior litigation as a historical backdrop for Ordinance 03-063, the Board determined in its Final Decision and Order (Corrected FDO) that Ordinance 03-063 did not comply with the GMA and was invalid. The Board addressed two sets of issues raised by Petitioners, but declined to address a third set of issues.[5]

One set of issues involved Petitioners' contentions that the re-designation of designated agricultural lands of long-term commercial significance in Island Crossing was not supported by the record before the County and therefore failed to comply with the GMA.[6] The Board agreed with Petitioners:

> [T]he Board concludes that the County's Ordinance draws scant credible and objective support from the record. In contrast, the arguments advanced by Petitioners are supported by credible and objective evidence in the record. The record suggests that the land continues to meet the criteria for the designation of agricultural land. This is true regarding the question of prime farmland soil characteristics and whether the 75.5 acres are of long-term commercial significance. Contrary to the County's Ordinance Finding, the record weighs heavily toward the denial of the de-designation....

---

[5] Because it decided the first two sets of issues in favor of Petitioners, the Board concluded it need not decide Petitioners' third set of allegations: that Ordinance 03-063 did not comply with RCW 36.70A.060(2) and .170(1)(d) because it expanded the Arlington UGA into the 100-year floodplain of the Stillaguamish River, which the County has designated as a frequently flooded area under the GMA, and allowed for commercial development in the floodplain. Corrected FDO at 38 (CP vol. XIII, p. 2599).

[6] Corrected FDO at 14 (Legal Issue 2) (CP vol. XIII, p. 2575).

> The Board concludes that the County's action removing the resource lands designation from 75.5 acres at Island Crossing was unsupported by the record and therefore was **clearly erroneous**. The Board therefore concludes that the County's reclassification of those lands from Riverway Commercial Farmland to Urban Commercial and the rezoning of them from Agriculture-10 Acres to General Commercial (CG) as contained in Ordinance No. 03-963, **does not comply** with the requirements of RCW 36.70A.170(1)(a), and RCW 36.70.060(1) and WAC 365-190-050 (pursuant to RCW 36.70A.050 and .170(1)(a))....
>
> ...
>
> The Board concludes that the Petitioners have carried the burden of proof to show that Snohomish County Ordinance No. 03-063 **failed to be guided by and did not substantively comply** with RCW 36.70A.020(8) and that it **failed to comply** with RCW 36.70A.040, .060(1) and .170(1)(a). The Board finds that the County's action was **clearly erroneous** in concluding that this land no longer meets the criteria for designation as agricultural land of long-term commercial significance....

Corrected FDO at 29-30 (emphasis in original) (CP vol. XIII, pp. 2590-91).

The other set of issues addressed by the Board involved Petitioners' contentions that expansion of the Arlington UGA was not supported by a land capacity analysis, as required both by the GMA and by the County's own County-Wide Planning Policies (CPPs).[7] Again, the Board agreed with Petitioners:

> As to whether the expanded UGA for Island Crossing meets the *locational* requirements of RCW 36.70A.110, the

[7] Corrected FDO at 30-31 (Legal Issues 1 and 4) (CP vol. XIII, pp. 2591-92).

Board agrees with Petitioners. The closest point of contact between Arlington's city limits and private property within the expansion area is approximately 700 feet. Also, the fact that limited sewer service is adjacent to, or even existing within, a rural area is not dispositive on the question of whether the area is urban in character. Therefore, the Board concludes that the subject property is not "adjacent to land characterized by urban growth," and does not comply with RCW 36.70A.110(1).

As to the *sizing* requirements for UGAs as set forth in RCW 36.70A.110(2) and .215, and *consistency* with CPP UG-14(d) [RCW 36.70A.210(1)], the Board also agrees with Petitioners. First, neither the County nor Intervenor indicates that a revised land capacity analysis supporting the need for a commercial/industrial UGA expansion has been conducted.... Second, CTED correctly argues that there is nothing in the County's recent Buildable Lands Report that supports the expansion of the Arlington UGA for commercial or industrial uses to include the Island Crossing area....

[T]here has not been a revision to the County's land capacity analysis that supports the expansion of this UGA for commercial or industrial uses. Therefore, the Board concludes that the expansion of the Arlington UGA to include the Island Crossing area does not comply with RCW 36.70A.110 and .215 and is not consistent with CPP UG-14(d) and RCW 36.70A.210(1). Further, since the County has **not complied** with the UGA requirements of RCW 36.70A.110, .215 and its own CPPs (RCW 36.70A.210), the Board also concludes that the County's action **was not guided by Goals 1, 2, and 8** [RCW 36.70A.020(1), (2), and (8).

...

The Board concludes that the Petitioners have carried the burden of proof to show that Snohomish Ordinance No. 03-063 **failed to be guided by and did not substantively comply** with RCW 36.70A.020(1), (2), and (8) and that it **failed to comply** with RCW 36.70A.110, .210(1) and .215. The Board concludes therefore the County action adopting Ordinance No. 03-063 was **clearly erroneous**....

Corrected FDO at 36-37 (citations and footnotes omitted, emphasis in original) (CP vol. XIII, pp. 2597-98).

Finally, the Board concluded the continued validity of Ordinance 03-063 would substantially interfere with RCW 36.70A.020(1), (2), and (8). Corrected FDO at 39 (CP vol. XIII, p. 2600). The Board therefore invalidated those portions of the ordinance that expanded the Arlington UGA and re-designated and rezoned the Island Crossing area for urban commercial development. Corrected FDO at 40 (CP vol. XIV, p. 2601).

In their appeals to this Court, the County and Arlington/Lane challenge the Board's determinations of noncompliance and invalidity in the Corrected FDO.

C. Snohomish County Emergency Amended Ordinance No. 04-057 and the Board's Order Finding Continuing Noncompliance and Invalidity and Recommendation for Gubernatorial Sanctions (At Issue in This Appeal)

In 2004, for the third time, Snohomish County adopted an ordinance to expand the Arlington UGA to include Island Crossing. Ordinance 04-057 was virtually identical to the invalidated 2003 ordinance: it amended the County's Comprehensive Plan and development regulations in exactly the same manner and extent as the invalidated 2003 ordinance had done.[8]

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[8] *1000 Friends of Wash., et al. v. Snohomish Cy.*, CPSGMHB No. 03-3-0019c, Order Finding Continuing Noncompliance and Invalidity and Recommendation for

In the compliance hearing to determine whether the County had achieved compliance with the GMA following the FDO, Petitioners relied on the record underlying both ordinances to argue that the same evidence and errors that rendered Ordinance 03-063 noncompliant and invalid were repeated in Ordinance 04-057. The Board agreed. Regarding the de-designation of agricultural lands in Island Crossing, the Board summarized its conclusion as follows:

> By the County's admission, the land use plan and zoning designations wrought by Ordinance No. 04-057 are identical to those created by noncompliant and invalid Ordinance No. 03-063. The only remedial action taken by the County on remand from the Board was to place more testimony in its record, both pro and con, regarding the historical or speculative future ability of specific individuals to profitably farm specific parcels within the Island Crossing triangle....
>
> ...
>
> The County's reliance on anecdotal, parcel-focused witness testimony as the primary determining factor of LTCS has too narrow a focus – it misses the broad sweep of the Act's natural resource goal, which is to maintain and enhance the agricultural resource *industry*, not simply agricultural operations on individual parcels of land. RCW 36.70A.020(8). This breadth of vision informs a proper reading of the Act's requirements for resource lands designation under .170 and conservation under .060. Reading these provisions as a whole, it is apparent that agricultural lands with "long-term commercial

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Gubernatorial Sanctions at 16 (June 24, 2004) (Order on Compliance) (CP vol. XV, p. 2900). For the Court's convenience, a copy of Ordinance 04-057 (CP vol. III, pp. 513-31) is attached as **Appendix D**, and a copy of the Order on Compliance (CP vol. XV, pp. 2886-2918) is attached as **Appendix E**.

significance" are *area-wide patterns of land use*, not localized parcel ownerships.

Historical or speculative statements by individuals regarding their personal inability to profitably farm certain parcels does not inform a GMA-required inquiry into the *long term commercial significance* of *area-wide patterns of land use* that are to *assure the maintenance and enhancement of the agricultural land resource base to support the agricultural industry.* By de-designating resource lands based on anecdotal testimony regarding specific parcels (the Island Crossing triangle viewed in isolation), as opposed to the contextual land use pattern of the agricultural lands and industry infrastructure that serves the surrounding Stillaguamish River Valley, the County has committed a clear error.

...

In the present case, the County does not claim that the "Island Crossing triangle" is isolated from an area-wide land use pattern of agricultural resource lands – indeed, these agricultural lands abut no other land use activity, save the small freeway service node that is itself isolated from the existing Arlington UGA. Nor does the County claim that the time for agriculture has passed in the Stillaguamish River Valley because the necessary infrastructure, including food processing plants nearby, has changed. The only evidence in this record supports the contrary conclusion.

...

In summary, the Board agrees with Petitioners that the County fails to carry its burden of proof pursuant to RCW 36.70A.320(4)[9] and that the County's comprehensive plan and development regulations for the Island Crossing

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[9] As noted below at pages 26-27, RCW 36.70A.320(4) provides that a county or city subject to a determination of invalidity made under RCW 36.70A.300 or 36.70A.302 has the burden of demonstrating that the ordinance or resolution it has enacted in response to the determination of invalidity will no longer substantially interfere with the fulfillment of the goals of the GMA. Because the Board invalidated Ordinance 03-063 in its FDO, the County bore the burden of demonstrating Ordinance 04-057 no longer substantially interfered with the GMA's goals.

> triangle continues to not comply with the GMA's resource lands provisions, specifically RCW 36.70A.020(8) and .040, .060(1), and .170(1)(a).

Order on Compliance at 16-19 (citations and footnotes omitted, emphasis in original) (CP vol. XV, pp. 2901-04).

Regarding the expansion of the Arlington UGA, the Board discussed a report prepared by a consultant for Mr. Lane that purported to update the City of Arlington's Buildable Lands Report required under RCW 36.70A.215. Calling it a "close question," the Board concluded the County's use of the consultant's report cured the County's inconsistency with its own County-Wide Planning Policy and thus achieved compliance with RCW 36.70A.215. *Id.* at 22 (CP vol. XV, p. 2907). However, use of the consultant's report did not cure noncompliance with the other GMA provisions governing UGA expansion:

> [A]chieving consistency between Ordinance 04-057 and UG-14(d) [the applicable County Wide Planning Policy], does not cure the County's noncompliance with RCW 36.70A.110 because it does not address the "UGA location" deficiencies identified in the FDO.... No new facts or reasoning are presented to disturb the Board's conclusions that Island Crossing continues to have agricultural lands of long-term commercial significance, that the presence of a sewer line is irrelevant, particularly given its limitations, that the freeway service uses do not rise to the status of "urban growth," and that Island Crossing is not "adjacent" to the Arlington UGA or a residential "population" of any sort. In fact, the private lands within this proposed UGA expansion would be connected to the Arlington UGA only by means of a 700

> foot long 'cherry stem' consisting of nothing but public right-of-way. While such dramatically irregular boundaries were common in the pre-GMA era, the meaning of "adjacency" under the GMA precludes such behavior.
>
> ...
>
> The Board concludes that Snohomish County has not carried its burden of proof in its attempt to overcome the finding of invalidity and noncompliance in the FDO, particularly with regard to RCW 36.70A.020(1) and (2), RCW 36.70A.040, and RCW 36.70A.110. The Board remains convinced that the County's reading of these areas of the law is in error, clearly erroneous.

Id. at 22-23 (CP vol. XV, 2907-08).

On appeal, the County and Arlington/Lane challenge these determinations of continuing noncompliance and invalidity in the Board's Order on Compliance.

D. The Board's Order Granting Reconsideration [Revising Finding of Fact 17] and Denying Motion to Enter Determination of Validity Pursuant to RCW 36.70A.302(4) (Not Challenged on Appeal)

In response to the Order on Compliance, Snohomish County moved for a determination of validity, arguing the savings clause in Ordinance 04-057 automatically revived prior ordinances that were compliant with the GMA. The Board denied the motion:

> The Board concludes that the effect of the operation of the severability clause is ambiguous and in doubt. Does the initial determination of invalidity, its rescission, its reinstatement act as an impediment to reviving the land use designations prior to the adoption of Ordinance No. 03-063? The Board has been cited to no authority conclusively answering this question. However, as

> discussed *supra*, to remove this ambiguity and doubt, and reflect the County's intent as indicated in its motion, it should take legislative action to reinstate prior GMA compliant designations and repeal provisions of Ordinance Nos. 03-063 and 04-057 that contradict and conflict with those designations. Such action would remove any ambiguity and doubt arising from the operation of the severability clause. Affirmative action such as this seems especially appropriate to provide certainty and clarity to the citizens of Snohomish County and where the County is facing a recommendation of Gubernatorial sanctions. Therefore, the Board **denies** the County's Motion for a Determination of Validity, pursuant to RCW 36.70A.302(4).

Order On Reconsideration at 9 (CP vol. XV, p. 2973) (emphasis in original).[10]

The County and Arlington/Lane are not challenging the Board's denial of the County's motion to enter a determination of validity.

E. The Governor's Imposition of Sanctions, Snohomish County Resolution No. 05-001, and the Governor's Rescission of Sanctions (Not Challenged on Appeal)

In its Order on Compliance, the Board recommended that the Governor impose economic sanctions on Snohomish County under RCW 36.70A.340:

> Significantly, Ordinance No. 04-057 represents Snohomish County's **third** attempt under the GMA (and second attempt within the past nine months) to convert Island

[10] *1000 Friends of Wash., et al. v. Snohomish Cy.*, CPSGMHB No. 03-3-0019c, Order Granting Reconsideration [Revising Finding of Fact 17] and Denying Motion to Enter Determination of Validity Pursuant to RCW 36.70A.302(4) (July 22, 2004) (Order on Reconsideration) (CP vol. XV, pp. 2965-74). For the Court's convenience, a copy of this Order is attached as **Appendix F**.

> Crossing from a part of the designated agricultural resource lands of the Stillaguamish River Valley into Arlington's urban growth area. It has done so notwithstanding consistent contrary readings of the Growth Management Act by the Snohomish County SEPA Responsible Official, Snohomish County Executive, the Growth Management Hearings Board, Snohomish County Superior Court, the First Division of the Washington State Court of Appeals, and the Governor of the State of Washington.
>
> By its actions, the County Council has evidenced an ongoing unwillingness to comply with those portions of the Growth Management Act with which it disagrees. Therefore, the Board will recommend to the Governor that he impose financial sanctions authorized by RCW 36.70A.340....

Order on Compliance at 24 (footnotes omitted) (CP vol. XV, p. 2909).

Former Governor Locke accepted the Board's recommendation and imposed economic sanctions on the County, which were to take effect March 1, 2005.[11] The County responded by adopting Resolution 05-001, which clarified the effect of the severability clause in Ordinance 04-057.[12]

At the Governor's request, the Board reviewed Resolution 05-001, found it removed ambiguity in the severability clause in Ordinance 04-057, and concluded the severability clause had revived the agricultural designations for Island Crossing that predated Ordinance 03-063 (rather than the urban designations in Ordinance 03-063). On that basis, the Board issued a finding of compliance, rescinded invalidity, and withdrew

[11] CP vol. III, pp. 592-93.

[12] CP vol. II, pp. 274-79.

its recommendation for gubernatorial sanctions.[13] The next day, two months before they were to have taken effect, the Governor rescinded sanctions on Snohomish County.

On appeal, the County and Arlington/Lane have not challenged the Board's Order Finding Compliance, the Governor's imposition of sanctions, or the lifting of sanctions.

F. Petition for Review in Superior Court

Multiple petitions for judicial review were filed by Snohomish County and jointly by the City of Arlington and Mr. Lane, challenging both the FDO and the Order on Compliance. CP vols. XV-XVII, pp. 2984-3238. Ultimately, the petitions were consolidated into a single appeal, which was determined by Snohomish County Superior Court in an oral decision entered on May 11, 2005. CP vol. I, pp. 96-130.

The Court first granted a motion to dismiss filed by the Stillaguamish Flood Control District and Futurewise (Petitioners below). The motion argued that, based on the record before the Board, the County's adoption of Ordinances 03-063 and 04-057 was barred by the

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[13] *1000 Friends of Wash., et al. v. Snohomish Cy.*, CPSGMHB No. 03-3-0019c, Order Withdrawing the Recommendation of Gubernatorial Sanctions, Rescinding Invalidity and Finding Compliance (Jan. 6, 2005). CP vol. III, pp. 476-81. For the Court's convenience, a copy of this Order is attached as **Appendix G.**

principles of res judicata and collateral estoppel.[14] The Court held (1) the argument had been raised before the Board and had not been waived, but the judicial proceeding was the first opportunity to have the issues addressed; (2) principles of res judicata and collateral estoppel may be applied to the County's adoption of Ordinances 03-063 and 04-057; (3) nothing in the Snohomish County Code precluded application of res judicata to the actions of the County Council; (4) the subject matter and parties were the same as in the prior litigation that culminated in this Court's decision in *Lane*, 2001 WL 244384; and (5) there was no showing of changed circumstances since the prior litigation. Court's Oral Decision at 12-19 (CP vol. I, pp. 107-114).

Notwithstanding its decision to grant the motion to dismiss, the Court also reviewed the merits of the Board's orders and upheld the Board in all respects. In particular, the Court held (1) each conclusion reached by the Board was supported by evidence in the record; (2) the Board gave proper deference to the County, consistent with *Quadrant Corp.* 154 Wn.2d 224; (3) the Board correctly concluded, based on the record as whole, that the County's de-designation of agricultural lands in Island Crossing was clearly erroneous and did not comply with RCW

[14] CTED did not join in this motion and has taken no position on the issues raised in the motion or the responses to the motion. Before this Court, CTED continues its neutrality as to those issues.

36.70A.040, .060(1), and .170(1)(a), and was not guided by RCW 36.70A.020(8); (4) the Board correctly concluded the County's expansion of the Arlington UGA and rezoning of Island Crossing was clearly erroneous and did not comply with RCW 36.70A.110 and .215; and (5) the Board's determination of invalidity was consistent with RCW 36.70A.302 and supported by appropriate findings and conclusions. Court's Oral Decision at 19-29 (CP vol. I, pp. 114-124) (upholding FDO); *id.* at 29-34 (CP vol. I, pp. 124-129) (upholding Order on Compliance and Order on Reconsideration).

This appeal followed.

III. STANDARD OF REVIEW

Judicial review of a decision of a Growth Management Hearings Board is conducted under the Administrative Procedures Act (APA), RCW 34.05. *Thurston Cy. v. Cooper Point Ass'n.*, 148 Wn.2d 1, 7, 57 P.3d 1156 (2002). This Court reviews the Board's decision, not that of the County or the Superior Court. *Id.*; *King Cy. v. Cent. Puget Sound Growth Mgmt. Hrgs. Bd.*, 142 Wn.2d 543, 553, 14 P.3d 133 (2000) (*King Cy. III*). The Court's review is based on the record made before the Board. *Thurston Cy.*, 148 Wn.2d at 7; *King Cy. III*, 142 Wn.2d at 553. The burden of demonstrating the invalidity of the Board's decision is on the party asserting invalidity—in this case that burden rests on Snohomish

County, the City of Arlington, and Mr. Lane. *Thurston Cy.*, 148 Wn.2d at 7; *King Cy. III*, 142 Wn.2d at 553; RCW 34.05.570(1)(a).

The APA sets forth nine bases for granting relief from the Board's decision, RCW 34.05.570(3), of which the County and Arlington/Lane allege four: subsections (c), (d), (e), and (i). *See* Snohomish Cy. Br. at 5-8; Arlington/Lane Br. at 14-15.[15]

Unlawful Procedure and Error of Law. RCW 34.05.570(3)(c) authorizes relief if the County and Arlington/Lane demonstrate the Board engaged in unlawful procedure or decision-making process or failed to follow a prescribed procedure. RCW 34.05.570(3)(d) authorizes relief if they demonstrate the Board erroneously interpreted or applied the law. Under these subsections, the Court reviews the Board's legal conclusions de novo. The Court may give substantial weight to the Board's interpretation of the GMA, but it is not bound by the Board's interpretation. *King Cy. III*, 142 Wn.2d at 553. As explained below at

[15] On pages 12 and 45 of its opening brief, Snohomish County cites a fifth basis for relief, RCW 34.05.570(3)(b), which is not identified in the County's assignments of error or statement of issues pertaining to assignments of error, as required in RAP 10.3(a), (g), and (h), and which is not supported by argument or citation in the County's brief. It should not be reviewed by this Court. *In re Brock*, 126 Wn. App. 957, 961 n.1, ¶2 n.1, 110 P.3d 791 (2005); *Escude ex rel. Escude v. King Cy. Publ. Hosp. Dist. No. 2*, 117 Wn. App. 183, 190 n.4, 69 P.3d 895 (2003). The City of Arlington and Mr. Lane do not cite or rely on RCW 34.05.570(3)(b). *See* Arlington/Lane Br. at 14-15.

If the Court nevertheless determines to review the Board's orders under RCW 34.05.570(3)(b) (authorizing relief if the County demonstrates the order is outside the Board's statutory authority or jurisdiction), the Court reviews the Board's statutory authority or jurisdiction de novo. *See Skagit Surveyors & Engineers, LLC v. Friends of Skagit Cy.*, 135 Wn.2d 542, 557-68, 860 P.2d 963 (1998).

pages 21-23, the Board's legal conclusions are not entitled to substantial weight if the Court concludes the Board failed to apply the appropriate standard of review when reviewing a local government's actions.

Substantial Evidence. RCW 34.05.570(3)(e) authorizes relief if the County and Arlington/Lane demonstrate the Board's order is not supported by evidence that is substantial when viewed in light of the whole record before the Court. In this case, the record before this Court is the record that was before the Board. Substantial evidence is a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order. *Thurston Cy.*, 148 Wn.2d at 8 (citing *Callecod v. Wash. State Patrol*, 84 Wn. App. 663, 673, 929 P.2d 510, *review denied*, 132 Wn.2d 1004 (1997)). The reviewing Court does not weigh the evidence or substitute its view of the facts for that of the Board. *See Callecod*, 84 Wn. App. at 666 n.9. On mixed questions of law and fact, the Court determines the law independently, then applies it to the facts as found by the Board. *Thurston Cy.*, 148 Wn.2d at 8.

Arbitrary and Capricious. RCW 34.05.570(3)(i) authorizes relief if the County and its supporters demonstrate the Board's order is arbitrary or capricious. "Arbitrary and capricious" means willful and unreasoning action, taken without regard to or consideration of the facts and circumstances surrounding the action; where there is room for two

opinions, an action taken after due consideration is not arbitrary and capricious even though the reviewing Court may believe it to be erroneous. *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hrgs. Bd.*, 136 Wn.2d 38, 46, 959 P.2d 1091 (1998) (*Redmond I*). The arbitrary and capricious test is a very narrow standard and the one asserting it "must carry a heavy burden." *Pierce Cy. Sheriff v. Civil Serv. Comm'n*, 98 Wn.2d 690, 695, 658 P.2d 648 (1983).

Relief. RCW 34.05.574 limits the relief available to the County and its supporters. The Court may affirm the Board's order, order the Board to take action or exercise discretion required by law, enjoin or stay the Board's decision, remand the matter for further proceedings, or enter a declaratory judgment order. RCW 34.05.574(1). "In reviewing matters within agency discretion, the court shall limit its function to assuring that the agency has exercised its discretion in accordance with law, and shall not itself undertake to exercise the discretion that the legislature has placed in the agency." RCW 34.05.574(1). Accordingly, a reviewing court may set aside the Board's decision, but it lacks authority to find the County's ordinance complies with the GMA. *See Manke Lumber Co. v. Diehl*, 91 Wn. App. 793, 809-810, 959 P.2d 1173 (1998).

IV. ARGUMENT

A. The Board Defers to a Local Government Decision Unless the Record Shows Clear Error by the Local Government

As an initial matter, the County and its supporters raise two arguments regarding the amount of deference County ordinances should receive from the Board. Snohomish Cy. Br. at 8-12; Arlington/Lane Br. at 13, 15-18. Citing RCW 36.70A.3201, they argue first that the Board must give broad deference to a local government's decisions as to how it plans for growth under the GMA.

When the same argument was made in *Thurston Cy. v. Cooper Point Ass'n,* the Supreme Court responded that "deference is only given to policy choices that are consistent with the goals and requirements of the GMA." *Thurston Cy.*, 148 Wn.2d at 14. Where a county's action does what the GMA prohibits, the Board is not required to accord deference to the county's interpretation of the GMA. *Id.*[16] The Court in *Quadrant Corp.* explained further that deference to the local government ends when it is shown that a local government's action is a "clearly erroneous" application of the GMA. *Quadrant Corp.*, 154 Wn.2d at 238, ¶ 23; *see also id.*, 154 Wn.2d at 240 n.7, ¶ 27 n.7.

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[16] This is the answer, of course, to the County's assertion that the Board "admitted" it failed to defer to the County. Snohomish Cy. Br. at 12, 34. There was no failure. The Board is not required to defer to a clearly erroneous interpretation of the GMA.

In other words, if the local government has made a policy choice that is permissible under the GMA, neither the Board nor a reviewing Court may require a different choice; but neither the Board nor the Court owes deference to a local GMA action where the record shows clear error because of a failure to comply with the goals and requirements of the GMA. This link between the record and the standard of review preserves and gives effect to the Board's statutory duty to determine whether a challenged local government action complies or does not comply with the GMA—i.e., whether it is a clearly erroneous application of the GMA. *See* RCW 36.70A.280(1)(a); .320(3); *Quadrant*, 154 Wn.2d at 238, ¶ 23; *Diehl v. Mason Cy.*, 94 Wn. App. 645, 660, 972 P.2d 543 (1999).

Deference to local policy decisions therefore requires a review of the record as a whole. The Board (and the reviewing Court) is not required to defer to the County Council's specific findings, because the Board is required by law to enter its own findings based on the entire record before it. RCW 36.70A.290(4) mandates that Board decisions be based on the record before the local government—not the findings of the local government—and authorizes the Board to consider additional evidence that is "necessary or of substantial assistance to the board in reaching its decision." Similarly, RCW 36.70A.270(6) requires the Board to enter findings of fact in all decisions, and RCW 36.70A.302(1)(b)

requires the Board to enter findings of fact and conclusions of law supporting any determination of invalidity.

Whether actions taken by local governments under the GMA comply with the goals and requirements of the GMA is based on evidence in the record, and the Board is authorized to determine compliance or noncompliance when a challenge is properly filed with the Board. *See* RCW 36.70A.280(1); .300(3). There is deference to local policy choices under the GMA, but that deference ends where the record demonstrates clearly erroneous action by the local government. That deference does not preclude meaningful review by the Board.

B. The GMA's "Presumption of Validity" Is Not a "Presumption of Compliance"

The County and its supporters also contend the challenged ordinances are entitled to a presumption of validity under the GMA. Snohomish Cy. Br. at 8; Arlington/Lane Br. at 15-16. While they are correct that there is a presumption of validity, their argument inaccurately conflates the presumption of validity in RCW 36.70A.320(1) with the clearly erroneous standard of proof in RCW 36.70A.320(3). They are not two sides of a coin, but rather "two distinct alternatives" for assessing and addressing noncompliance with the GMA. *King Cy. v. Cent. Puget Sound*

Growth Mgmt. Hrgs. Bd., 138 Wn.2d 161, 180, 979 P.2d 374 (1999) (*King Cy. II*).[17].

Presumption of Validity. The presumption of validity in RCW 36.70A.320(1) was included in the GMA to clarify that GMA plans and regulations are legally effective upon adoption without state or regional approval, in contrast to growth management legislation in states such as Oregon and Hawaii which require state approval before a local plan takes effect. *See* Richard L. Settle & Charles G. Gavigan, *The Growth Management Revolution in Washington: Past, Present, and Future*, 16 U. Puget Sound L. Rev. 867, 874, 925 (1993). It is not a burden of proof for review for the Board to apply, but rather a legal presumption that a plan or regulation is effective and enforceable when adopted.

Comprehensive plan provisions and development regulations are presumed valid when adopted (except for the shoreline element adopted

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[17] This Court's opinion in *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hrgs. Bd.*, 116 Wn. App. 48, 65 P.3d 337, *review denied*, 150 Wn.2d 1007 (2003) (*Redmond II*), is not to the contrary. The opinion held the Board had imposed an impermissible legal standard when it subjected the de-designation of agricultural lands to "heightened scrutiny" and improperly required the City to establish the validity of its new land use designation. *Id.* at 58. While that opinion used the words "validity" and "invalidity" when describing the Board's conclusions regarding "compliance" and "noncompliance," it appears the usage was based in part on similar imprecision by the Supreme Court in *Redmond I*, 136 Wn.2d 138. *See Redmond II*, 116 Wn. App. at 52 n.3. This Court did not distinguish the terms, but neither did it say that validity and compliance are synonymous. Notably, when necessary to distinguish validity and compliance, this Court has done so with precision. *See King Cy. v. Cent. Puget Sound Growth Mgmt. Hrgs. Bd.*, 91 Wn. App. 1, 27-28, 951 P.2d 1151 (1998) (*King Cy. I*), *aff'd in part, reversed in part on other grounds*, 138 Wn.2d 161, 979 P.2d 374 (1999) (*King Cy. II*).

under RCW 90.58, which requires Ecology approval). RCW 36.70A.320(1). A "valid" plan or regulation is one that has legal effect and can be enforced. *Skagit Surveyors*, 135 Wn.2d 559-62; *King Cy. II*, 138 Wn.2d at 181. A finding of noncompliance and an order of remand does not affect the validity of a plan or regulation unless the Board also makes a specific determination of invalidity.[18] RCW 36.70A.300(4); *Skagit Surveyors*, 135 Wn.2d 559-60; *King Cy. II*, 138 Wn.2d at 180-81. The scope of that invalidity is defined in RCW 36.70A.302(2) and .302(3). A determination of invalidity may be made in an FDO following the initial hearing on the merits or in an order following a compliance hearing. RCW 36.70A.300(4); .330(4).

Clearly Erroneous Burden of Proof. The presumption of validity in RCW 36.70A.320(1) does not create any parallel presumption of compliance. More importantly, it does not increase the already-

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[18] The Growth Management Hearings Boards have had authority since their creation to determine that a challenged comprehensive plan or development regulation did not comply with the GMA. *See* Laws of 1991, Sp. Sess., Ch. 32, §§ 5-7, 9-11, 13-14. The authority to invalidate a comprehensive plan or development regulation was not granted the Boards until 1995. *See* Laws of 1995, ch. 347, §§ 110, 112.

The Boards were granted specific authority to invalidate local land use legislation adopted under the GMA following the recommendation of the Governor's Task Force on Regulatory Reform. *Skagit Surveyors*, 135 Wn.2d at 561. The Task Force described the confusion that had developed as to whether a plan or regulation found not to comply with the GMA's requirements could be enforced after the Board issued a final order of noncompliance. *Id.* Acknowledging that a local plan or regulation which violates state law is technically invalid and unenforceable, the Task Force nevertheless recommended that a comprehensive plan or development regulation held not to comply with the GMA should remain in effect unless the Board specifically determines continued enforcement of the plan or regulation would violate GMA policy. *Id.*

significant burden on a petitioner before the Board, who must show that a challenged ordinance is clearly erroneous in view of the entire record before the Board and in light of the GMA's goals and requirements. RCW 36.70A.320(2); .320(3). That is precisely the demonstration Petitioners made to the Board in this case. Upon such a showing, the Board is authorized to make a determination of noncompliance. RCW 36.70A.300(3); .320(3).

Burden Shifts in Compliance Phase. In the compliance phase of the proceedings before the Board, the burden of proof is different. A county or city subject to a determination of invalidity under RCW 36.70A.300 or .302 has the burden of demonstrating the ordinance or resolution it enacted in response to the determination of invalidity will no longer substantially interfere with the fulfillment of the goals of the GMA. RCW 36.70A.320(4). In this case, because the Board invalidated Ordinance 03-063 in its FDO, the burden was on the County to demonstrate the validity of Ordinance 04-057.

If the Board, in the compliance phase, determines the new ordinance or resolution will no longer substantially interfere with the fulfillment of the goals of the GMA, under RCW 36.70.302(7), the burden shifts back to the challengers to demonstrate noncompliance under RCW 36.70A.320(2) and .330. If substantial interference is found to continue,

the new ordinance is remanded for further action by the local government to remove the substantial interference.

C. The Board Properly Applied the Statutory Test for Determining Whether Lands Are to Be Designated as "Agricultural Lands of Long-Term Commercial Significance" Under the GMA

On appeal, the Court reviews the Board's orders under the standards in the APA to ensure the Board applied the correct legal standards and grounded its orders in the record as a whole. The Court affords APA deference to the Board's interpretation and application of the GMA, unless it finds the Board did not properly apply the clearly erroneous standard when reviewing the County's actions or it finds the County's actions were not clearly erroneous.

The County and Arlington/Lane contend the Board erred as a matter of law when it determined the County's de-designation of agricultural lands in Island Crossing did not comply with the GMA. They argue (1) that de-designation was supported by the record, (2) that the Board improperly shifted the burden of proof to the County to justify de-designation, and (3) that the Board impermissibly imposed a new test

for de-designating agricultural lands. We respond to those arguments in this section of the brief.[19]

1. The Board's Determination That Agricultural Lands in Island Crossing Are of Long-Term Commercial Significance is Supported by Substantial Evidence in the Record

The County and Arlington/Lane contend the County Council's findings in Ordinance 03-063 and 04-057 were supported by the record or, alternatively, that the record is equivocal requiring the Board should have deferred to the County's determination. Snohomish Cy. Br. at 16-35; Arlington/Lane Br. at 28-35. Appellants' arguments center on an analysis of the criteria in WAC 365-190-050. To avoid duplicative briefing, CTED relies on the response of Futurewise (formerly 1000 Friends of Washington) in its brief, and CTED incorporates Futurewise's response herein by reference.

2. The Board Did Not Shift the Burden of Proof to the County or Apply "Heightened Scrutiny" to the County's De-Designation of Agricultural Lands

Arlington/Lane contends the Board improperly shifted the burden of proof, requiring the County to justify de-designating Island Crossing's agricultural lands by demonstrating there had been a material change in

[19] We respond to Appellants' arguments regarding the expansion of the Arlington UGA to include Island Crossing and the re-designation of Island Crossing for urban commercial development in section D, beginning *infra* at page 37.

circumstances since this Court's 2001 decision in *Lane*. Arlington/Lane Br. at 17-22.

As a preliminary matter, Arlington/Lane cite *Redmond II* for the premise that Island Crossing should be "viewed with fresh eyes, untainted by prior designations." Arlington/Lane Br. at 27 (citing *Redmond II*, 116 Wn.2d at 55). This is a correct premise if it refers to the Petitioners' burden to demonstrate clear error to the Board, but it does not require the Board to ignore evidence in the record. Here, the history of agricultural designation and use is relevant to a determination whether these particular lands meet the statutory criteria for designation and conservation of agricultural lands. This Court's decision in *Lane* is part of that history. The statutory object of the GMA is to slow or prevent the permanent loss of agricultural lands of long-term commercial significance. *See Redmond I*, 136 Wn.2d at 48 (explaining importance of agricultural lands designation and conservation under the GMA); *King Cy. III*, 142 Wn.2d at 555-59 (same).

The Board did not shift the burden of proof in the Final Decision and Order. Petitioners brought forth record evidence demonstrating that the agricultural lands in Island Crossing continue to satisfy the statutory criteria for designation and conservation as agricultural lands of long-term commercial significance and argued there was not comparable evidence to

support the County's contrary conclusion. Petitioners relied on this evidence to show that circumstances had not changed at Island Crossing since this Court's 2001 decision in *Lane* and to argue that the evidence now supported a legal conclusion like that affirmed by this Court in *Lane*.[20] In the FDO, the Board explained that Petitioners had made a "prima facia case supporting the assertion that there have been no changes to the soil condition, nor any changed circumstances that could support the County's revision of the 75.5 acres from agricultural resource lands to non-agricultural resource lands commercial uses." Corrected FDO at 27 (CP vol. XIII, p. 2588).

The Board then turned to the evidence cited by the County. It is not a shifting of the burden of proof to give the County an opportunity to respond to Petitioners and to identify record evidence it believed supported its actions. When the Board did so and reviewed the evidence cited by the County and Mr. Lane, it concluded they had not cited to

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[20] CTED's argument is not that this Court's decision in *Lane*, 2001 WL 244384, compelled the Board's decision in the present case; rather, we have argued that if the present evidence shows no change in circumstances at Island Crossing since the prior litigation, there is no principled reason for the Board to reach a contrary result now. CTED is not arguing that *Lane* is precedential.

As noted above at pages 15-16, CTED is taking no position as to whether principles of res judicata and/or collateral estoppel apply to the present case. We note, however, that there is no indication the Board believed this Court's decision in *Lane* foreclosed the County from de-designating Island Crossing. The Board took pains to explain that the GMA does not preclude the de-designation of agricultural lands. Order on Compliance at 18 (CP vol. XV, p. 2903).

"credible, objective evidence to refute or reconcile the substantial record evidence" identified by Petitioners. Corrected FDO at 28 (CP vol. VIII, p. 2589). It is not a shifting of the burden for the Board to weigh the record evidence cited by Petitioners against that cited by the County and Mr. Lane, and then to conclude that the evidence in the record supports Petitioners' arguments. Indeed, this is the very task assigned to the Board by the Legislature. RCW 36.70A.290(4). Based on its review of the evidence in the record applied to the requirements of the GMA, and appropriately placing the burden on Petitioners to prove clear error by the County, the Board expressly concluded Petitioners had "carried the burden of proof" to show Ordinance 03-063 did not comply with the GMA and was clearly erroneous. Corrected FDO at 30 (CP vol. XIII, p. 2591). When reviewed in its entirety, the Board's decision did not shift the burden to the County; it required the Petitioners to meet their burden.

In the compliance phase of the proceedings before the Board, the record before the Board included all the evidence that was presented in the hearing and briefing that led to the FDO. Petitioners argued that nothing the County had added to the record constituted evidence sufficient to cause the Board to change its conclusion in the FDO that the agricultural lands in Island Crossing satisfy the statutory criteria for designation and conservation as agricultural lands of long-term commercial significance.

The County had obtained additional testimony which it placed in the record to support de-designation. The Board found this testimony did not overcome the evidence Petitioners had identified in the record to support a determination that Ordinance 04-057 did not comply with the GMA and was clearly erroneous:

> By the County's admission, the land use plan and zoning designations wrought by Ordinance No. 04-057 are identical to those created by noncompliant and invalid Ordinance No. 03-063.... The only remedial action taken by the County on remand from the Board was to place more testimony in its record, both pro and con, regarding the historical or speculative future ability of specific individuals to profitably farm specific parcels within the Island Crossing triangle....
>
> ...The County errs in its assumption that "long term commercial significance" is determined simply by weighing anecdotal, parcel-specific witness testimony. As explained *infra*, the Board concludes that the County's reading of the law is incorrect, clearly erroneous, and Respondent therefore fails to carry its burden of proof for the removal of noncompliance and invalidity.

Order on Compliance at 16-17 (footnote omitted) (CP vol. XV, pp. 2901-02).[21] As explained above, it is not a shifting of the burden for the Board to weigh the record evidence cited by Petitioners and the

[21] In the quoted passage, the Board imprecisely stated that the County had failed to carry its burden of proof for the removal of noncompliance and invalidity. As explained above at page 26, the burden was on the County to demonstrate the determination of substantial interference imposed on Ordinance 03-063 was removed by its adoption of Ordinance 04-057. If the new ordinance fails to remove substantial interference, noncompliance continues as well and the matter is remanded to the County for further action. RCW 36.70A.302(7), .320(4). Any error in the Board's imprecision thus is harmless.

County and to conclude that the evidence in the record supports Petitioners' arguments.

The Board's Order on Compliance, like the FDO that preceded it, rested on substantial evidence in the record. The Board properly applied the statutory burdens of proof, and the Petitioners met their burden in each instance.[22]

3. The GMA Requires an "Area-Wide" Process for Designating and Conserving Agricultural Lands

Snohomish County contends the Board's Order on Compliance imposed a new test for re-designating agricultural lands. Snohomish Cy. Br. at 39-45. The County explains its dissatisfaction as follows:

> Instead of looking at the specific parcel in question, the Board said that counties must engage in an "area-wide" inquiry regarding "patterns of land use" and consider the impacts on the entire "agricultural industry." However, there is no requirement in the GMA, nor any provision in WAC 365-190-050(1), that requires a county to undergo such an analysis ...
>
> The Board's new "test" is contrary to the language of the GMA as construed by the Supreme Court in Redmond I....

Id. at 42-43. Arlington/Lane briefly echo this argument. Arlington/Lane Br. at 23.

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[22] Because the Board properly assigned the burden of proof, Arlington/Lane's contention that the Board imposed "heightened scrutiny" on the County's ordinances (Arlington/Lane Br. at 20) is without support in the record.

The County reaches the wrong conclusion. In *Redmond I*, landowners argued for a parcel-specific analysis that focused on current use and landowner intent. The Court flatly rejected a parcel-by-parcel analysis, explaining that the GMA requires an "area-wide" process for designating and conserving agricultural lands:

> [T]here are compelling reasons against concluding the Legislature intended current use or land owner intent to control the designation of natural resource lands under the GMA. First, if current use were a criterion, GMA comprehensive plans would not be plans at all, but mere inventories of current land use.... The Legislature intended the land use planning process of GMA to be area-wide in scope when it required development of specific plans for natural resource lands and, later, comprehensive plans.
>
> Second, if land owner intent were the controlling factor, local jurisdictions would be powerless to preserve natural resource lands. Presumably, in the case of agricultural land, it will always be financially more lucrative to develop such land for uses more intense than agriculture.... All a land speculator would have to do is buy agricultural land, take it out of production, and ask the controlling jurisdiction to amend its comprehensive plan to remove the "agricultural land" designation.

Redmond I, 136 Wn.2d at 52-53 (emphasis added). On that basis, the Court held "land is 'devoted to' agricultural use under RCW 36.70A.030 if it is in an area where the land is actually used or capable of being used for agricultural production...." *Id.* at 53 (emphasis added). The Court explained that current or intended land use on a particular parcel may be considered along with other factors in determining "whether a parcel is in

an area primarily devoted to commercial agricultural production," but neither current use nor landowner intent on a particular parcel is conclusive to that determination. *Id.* (emphasis added).[23]

CTED agrees with Snohomish County that the designation and conservation of agricultural lands requires a review of the specific lands in question to determine whether they have long-term commercial significance. *See* Snohomish Cy. Br. at 40-41. But the assessment of long-term commercial significance cannot be solely parcel-specific if the County is to satisfy its statutory "duty to designate and conserve agricultural lands to assure the maintenance and enhancement of the agricultural industry." *King Cy. III*, 142 Wn.2d at 558. As the Court explained,

> Natural resource lands are protected not for the sake of their ecological role but to ensure the viability of the

[23] In this context, the County mischaracterizes the decision in *Panesko v. Lewis Cy.*, WWGMHB No. 00-2-0031c, Order Finding Noncompliance and Imposing Invalidity (Feb. 13, 2004). *See* Snohomish Cy. Br. at 43 n.31. In *Panesko*, Lewis County maintained it was not required to designate all land that is capable of being farmed, but was required only to conserve agricultural lands necessary to maintain and enhance the agricultural industry. *Id.* at 9. The approach used by Lewis County intentionally ignored the statutory factors in RCW 36.70A.030(10) and the criteria in WAC 365-190-050, using instead the second sentence of the goal in RCW 36.70A.020(8) as the sole criterion for designating and conserving agricultural lands. On that basis, Lewis County designated only a small fraction (less than 12 percent) of its actively-used farmland as agricultural land of long term commercial significance (with an additional 34 percent designated solely because it lay in the flood hazard zone). *Id.* at 6. The issue was whether Lewis County erred by relying solely on the GMA goal to the exclusion of the specific requirements in the GMA. The Board concluded that approach was clearly erroneous, and the Superior Court affirmed. The matter is on direct review to the Washington Supreme Court. *Lewis County v. W. Wash. Growth Mgmt. Hrgs. Bd.*, No. 76553-7.

> resource-based industries that depend on them. Allowing conversion of resource lands to other uses or allowing incompatible uses nearby impairs the viability of the resource industry.

Id. at 559 (quoting *Redmond I*, 136 Wn.2d at 47, and Settle & Gavigan, 16 U. Puget Sound L. Rev. at 907).

If the focus were purely parcel-specific, as Appellants advocate, the locational factors in WAC 365-190-050(1) would not serve the statutory purpose. The majority of those factors relate to economic use of the land—which is almost always financially more lucrative when developed for non-agricultural uses. *Redmond I*, 136 Wn.2d at 52. In contrast to the statutory purpose, a pure parcel-by-parcel approach would allow individual landowner intent to control whether agricultural lands should be designated or de-designated. As the Supreme Court recognized explicitly in *Redmond I* and implicitly in *King Cy. III*, the GMA requires an area-wide process for designating and conserving agricultural lands—and for determining which designated lands, if any, should be de-designated—in order to maintain and enhance the agricultural industry.

The Board therefore correctly concluded the County's analysis supporting de-designation of Island Crossing was clearly erroneous, even though it may have referred to the language of WAC 365-190-050(1). The County's analysis rested overwhelmingly and improperly on

individual landowner intent—on testimony and other evidence that reflected the desires of specific landowners to convert agricultural parcels to other, more lucrative uses. That evidence failed to address how these lands contribute to, or fail to contribute to, the future of the agricultural industry in the Stillaguamish River valley and Snohomish County. More significantly, the County's evidence failed to consider contrary evidence in the record which predominated and demonstrated clear error.

D. The Board Correctly Concluded the Expansion of the Arlington UGA Did Not Comply With the GMA Provisions Governing UGA Expansion

As summarized above at pages 6-8, the Board found the expansion of the Arlington UGA in Ordinance 03-063 did not comply with the GMA for two primary reasons. First, the record did not contain any valid land capacity analysis demonstrating a need for additional commercial or industrial land in the Arlington UGA, as required by RCW 36.70A.020(1) and (2), .110, and .215. Second, the expansion of the Arlington UGA to include Island Crossing did not meet the locational criteria for UGA expansion, contrary to RCW 36.70A.020(1) and (2), .110, and .215, because Island Crossing is not characterized by urban development and is not adjacent to land characterized by urban development. Corrected FDO at 36-37 (CP vol. XIII, pp. 2597-98). The Board invalidated Ordinance 03-063, determining that it was clearly erroneous and that it was not

guided by and substantively interfered with the fulfillment of the goals in RCW 36.70A.020(1) and (2). Corrected FDO at 38-40 (CP vols. XIII-XIV, pp. 2599-2601).

The County responded by adopting Ordinance 04-057, which was identical in substance and effect to Ordinance 03-063. The County asserted a land capacity analysis had been included in the record that demonstrated the need to expand the Arlington UGA. The purported analysis was a report, "Buildable Lands Report 2003 Update, City of Arlington UGA, Analysis of Availability of Commercial Parcels and Land Supply" (Large Parcel Analysis), prepared by a consultant commissioned by Mr. Lane.[24]

In the Order on Compliance at 22 (CP vol. XV, p. 2907), the Board concluded the Large Parcel Analysis was consistent with the applicable County-Wide Planning Policy, thus bringing the County into compliance with the consistency requirement in RCW 36.70A.210. However, the Board held the Large Parcel Analysis still did not cure the County's noncompliance with RCW 36.70A.110 because it did not address the locational deficiencies identified in the FDO. *Id.* *See* pages 11-12, *supra*.

[24] The undersigned attorney diligently searched the Clerk's Papers in the Court's files and was unable to locate a copy of the Large Parcel Analysis. It was attached to the County's Statement of Actions Taken to Comply, filed with the Board after the adoption of Ordinance 04-057; the undersigned attorney also was unable to locate a copy of that Statement in the Clerk's Papers.

On appeal, the City of Arlington and Mr. Lane contend the record does not support the Board's conclusions. They contend (1) Island Crossing already is characterized by urban development or adjacent to urban development, and (2) there was a demonstrated need for UGA expansion. They also contend the Board erred in relying on a land capacity analysis requirement that was "self-imposed" by the County, rather than mandated by the GMA. Before addressing these contentions, we briefly summarize the GMA provisions governing UGA expansion.

1. The GMA Limits the Location and Size of Urban Growth Areas

RCW 36.70A.110(1) requires all counties planning under the GMA, including Snohomish County, to designate urban growth areas within which urban growth shall be encouraged and outside of which growth can occur only if it is not urban in nature. In most instances, "[a]n urban growth area may include territory that is located outside of a city only if such territory already is characterized by urban growth." RCW 36.70A.110(1). UGAs must be designated in the comprehensive plan. RCW 36.70A.110(6).

RCW 36.70A.110(2) requires the size and boundaries of each UGA to reflect a 20-year planning horizon, based on the growth

management population projection made for the county by the state Office of Financial Management.

RCW 36.70A.110(3) specifies a priority for locating new urban growth: first, in areas "already characterized by urban growth that have adequate existing public facility and service capacities to serve such development"; second, in areas "already characterized by urban growth that will be served adequately by a combination of both existing public facilities and services and any additional needed public facilities and services that are provided by either public or private sources"; and third, in the remaining portions of UGAs. In the "remaining portions of UGAs," Board decisions have encouraged counties and cities to locate new development first in areas that are adjacent to areas already characterized by urban growth, to make the provision of government services more efficient and to minimize "leapfrog development."

RCW 36.70A.215(1) requires Snohomish County to adopt county-wide planning policies to establish a review and evaluation program to determine whether the County and its cities are achieving urban densities in UGAs and to identify reasonable measures, other than adjusting UGA boundaries, that will be taken to comply with the GMA's requirements. Such measures may include amendments to the comprehensive plan. RCW 36.70A.215(4).

The specific requirements in RCW 36.70A.110 and .215 directly serve the first two goals of the GMA: "Encourage development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner," and "Reduce the inappropriate conversion of undeveloped land into sprawling, low-density development." RCW 36.70A.020(1) and (2).

The requirement that urban growth should be directed to appropriately sized and delineated urban growth areas is one of the main organizing principles of the GMA's approach to managing growth.[25] Under RCW 36.70A.110, to determine the appropriate size and location of a UGA requires an appropriate analysis of land capacity. That analysis includes two interrelated components: (1) counties first must determine how much land should be included within UGAs to accommodate expected urban development, based on the state Office of Financial Management's twenty-year population forecast; (2) then counties must determine which lands in particular should be included within urban growth areas, based on the "locational criteria" provided in the GMA, especially in RCW 36.70A.110(3) and RCW 36.70A.215(1).[26]

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[25] *Association of Rural Residents v. Kitsap Cy.*, CPSGPHB No. 93-3-0010, Final Decision and Order (June 6, 1994).

[26] *See, e.g., Vashon-Maury v. King Cy.*, CPSGMHB No. 95-3-0008c, Order on Supreme Court Remand (June 15, 2000).

2. The Record Supports the Board's Conclusion That Island Crossing Is Not Characterized by Urban Development and Is Not Adjacent to Land Characterized by Urban Development

The Island Crossing area added to the Arlington UGA in Ordinance 03-063 and 04-057 has the appearance of a kite on a string, with the string providing the tenuous connection with the existing Arlington UGA to the south.[27] Island Crossing is a wedge-shaped area extending north approximately a mile from the existing Arlington UGA boundary, with the small end of the wedge to the south. The "string" runs some 700 feet along Interstate 5 and an access road, ostensibly to connect Island Crossing to the existing UGA boundary. The existing UGA boundary itself extends nearly a mile north of the Arlington city limits. Island Crossing is not adjacent to the City of Arlington or to its UGA, except by the string of a kite, and the freeway services clustered at the north end of Island Crossing lie approximately two miles from the Arlington city limits.

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[27] To assist the Court, copies of a map and two photographs in the record that depict the Island Crossing area are attached as **Appendix H**:

- The map, which shows the Island Crossing area in crosshatching, is found in Snohomish County's Draft Supplement Environmental Impact Statement (SDEIS) at CP vol. XI, p. 2132.
- The first aerial photograph of the Island Crossing, made in 2001, was taken from directly overhead; it is found in the SDEIS at CP vol. XI, p. 2131.
- The second photograph, made in 2003 shortly after Ordinance 03-063 was adopted, was taken from the southwest, with Island Crossing in the foreground and the Stillaguamish River in the background. CP vol. II, p. 322.

The City of Arlington and Mr. Lane argue the freeway services at the north end of Island Crossing constitute urban development. Arlington/Lane Br. at 34, 37-42. But, as explained above and in the response brief by Futurewise, the record shows that most of the land in Island Crossing is agricultural land, either in active agricultural use or capable of being farmed. Both the 2003 Draft Supplemental Environmental Impact Statement (CP vols. XI-XII, pp. 2061-2123), produced by the County to assess the proposed Arlington UGA expansion, and the subsequent Staff Report (CP vol. IX, pp. 1766-79), which recommended denial of Mr. Lane's request to expand the Arlington UGA, found no urban development in Island Crossing. The few businesses along the north edge of Island Crossing serve the rural population and travelers on I-5 and Highway 530, and the intensity of these rural/freeway businesses has not changed significantly since 1968. CP vol. XI, pp. 2131, 2183).

The Staff Report, prepared for the County Council, described Island Crossing as approximately 110.5 acres in size, with 35 acres designated Rural Freeway Service. The Rural Freeway Service area contains three gas stations, three restaurants, a motel, an espresso stand, agriculture (hay harvesting), and two single-family houses. The Riverway Commercial Farmland area (75.5 acre) contains two single-family houses

with outbuildings and roadside services operated by the Stillaguamish Tribe on a 2.5 acre triangular parcel at the Smokey Point Boulevard/SR 530 intersection. Snohomish County's GIS system estimates that of the 35 acres within the Rural Freeway Service area, approximately 12.72 acres are currently developed and 22.28 acres are undeveloped; within the 75.5 acres of Riverway Commercial Farmland 7.12 acres are developed and 68.38 acres are undeveloped. I-5 lies immediately west of the Dwayne Lane site. Properties to the north and east primarily consist of agricultural farmland. A fire station is located adjacent to the northeast corner of the site. CP vol. IX, p. 1767.[28]

The record therefore shows that Island Crossing is predominantly agricultural land and it is surrounded by agricultural land. Based on the evidence in the record, the Board reasonably and accurately concluded in the FDO that the Island Crossing area was not urban in character and was not "adjacent to land characterized by urban growth," so that its designation for inclusion in the Arlington UGA did not comply with RCW 36.70A.110(1). Corrected FDO at 36 (CP vol. XIII, p. 2597).[29]

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[28] Numerous photographs were submitted to the Board, many of which show the paucity of development in Island Crossing. Some of these photographs are included in **Appendix H**.

[29] Contrary to the assertion in Arlington/Lane Br. at 27 and 41-42, the Supreme Court's *Thurston Cy* opinion did not hold that the presence of water and sewer services will make an area "urbanized in nature." The Court explained that sewers are an "urban governmental service" which are not permitted in the rural area unless necessary to

No additional evidence regarding the alleged urban character of Island Crossing was provided by the County or its supporters following the FDO. Accordingly, there was nothing new in the record that could have or should have warranted a different conclusion in the Order on Compliance.

3. Ordinance 04-057 Was Not Supported by a Land Capacity Analysis Addressing the GMA's Locational Requirements for UGA Expansion

In the FDO, the Board concluded the County had not satisfied the locational requirements of RCW 36.70A.110. Corrected FDO at 36. In the Superior Court, the City of Arlington and Mr. Lane argued the Large Parcel Analysis, completed after the FDO, justified the inclusion of Island Crossing in the Arlington UGA. *See* CP vol. III, pp. 494-95. They do not appear to renew that argument before this Court, although they refer obliquely to the Large Parcel Analysis as showing "a need for additional commercial property in Arlington." Arlington/Lane Br. at 41.

As we explained to the Board and to the Superior Court, the Large Parcel Analysis is suspect, because it was designed more as a location analysis common to commercial site development than as a land capacity

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protect basic public health and safety and the environment. *Thurston Cy.*, 148 Wn.2d at 11. The Court did not say that a sewer extension automatically converted a rural area into an urban area; rather, it appeared to share the concern of the Growth Management Hearings Board that extension of urban services to rural areas "inevitably creates pressure to urbanize." *Id.* at 13. Pressure to urbanize is not equivalent to urbanization.

analysis supporting UGA expansion. Under the GMA, a land capacity analysis provides the factual basis for a determination that additional land is needed, based on the current 20-year population projection, RCW 36.70A.110(2), and it shows that the identified location or locations meet the locational criteria contained in RCW 36.70A.110(1) ("An urban growth area may include territory that is located outside of a city only if such territory already is characterized by urban growth..., or is adjacent to territory already characterized by urban growth, or is a designated new fully contained community as defined by RCW 36.70A.350").

The Large Parcel Analysis did not address the criteria specified in RCW 36.70A.110; it did not exhibit the characteristics of a land capacity analysis under the GMA. The Large Parcel Analysis apparently made no attempt to address the locational criteria contained in RCW 36.70A.110(1); instead it chose criteria that a development proponent would use in evaluating whether a particular site meets its needs. The use of such criteria are important considerations in development decisions and are appropriate for local governments to consider when planning for new development; but they are not an appropriate substitute for the locational analysis that must be done under RCW 36.70A.110(1).

The Board rejected the argument that the Large Parcel Analysis satisfied the locational requirements in RCW 36.70A.110, finding it did

not address the locational deficiencies identified in the FDO. Order on Compliance at 22. The Board's decision is consistent with the plain language of the GMA, cited above.

4. Criteria Adopted by a County to Guide UGA Expansion May Not Stand if They Allow UGA Expansions That Conflict With the GMA

Arlington and Mr. Lane argue the Board erred in relying on the County's "self-imposed" land capacity analysis requirement. Arlington/Lane Br. at 24-26.

The Board concluded that criteria for UGA expansion adopted by the County cannot compel UGA expansion in violation of the goals and requirements of the GMA. Order on Compliance at 23. In other words, the County may not use "self-imposed" criteria, such as the Large Parcel Analysis and CPP UG-14,[30] to justify Ordinance 04-057 where the UGA expansion provided for in that ordinance does not comply with the goals and requirements of the GMA. Order on Compliance at 23.

The City of Arlington and Dwayne Lane disagree, arguing that "self-imposed" criteria are a hallmark of local planning. Arlington/Lane Br. at 24. They maintain the Board should not inquire whether any such criteria produce a result that conflicts with the GMA; instead, they contend

[30] CPP UG-14 is the provision in the County-Wide Planning Policies that governs the expansion of existing UGAs in Snohomish County. At issue before the Board was whether Ordinances 03-063 and/or 04-057 were inconsistent with directives in UG-14, which would constitute a violation of RCW 36.70A.210(1).

the Board should look only at whether the local planning process is guided by the GMA. *Id.* at 24-25.

Arlington and Lane misunderstand the Board's conclusion. The Board did not suggest there is some inherent defect in a "self-imposed" guide or policy; the Board simply held that such a policy may not stand if it is challenged and found to conflict with the GMA. The Board was quite clear on this point:

> Here, the Board has determined, *supra*, that Ordinance No. 04-057 does not comply with the statutory requirements for resource lands and urban growth areas. Therefore, an argument that UG-14 somehow compels the inclusion of Island Crossing in the Arlington UGA is unavailing.

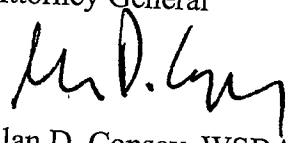
Order on Compliance at 23. Again, this conclusion simply implements the plain language of the GMA. *See, e.g.*, RCW 36.70A.300(3).

V. CONCLUSION

The Board's orders in this case are based on substantial evidence, they are consistent in all respects with the appellate decisions construing the agricultural conservation provisions of the GMA and the provisions governing the expansion of urban growth areas, and they are carefully reasoned and appropriately deferential to the County. The Board's orders should be affirmed by this Court.

RESPECTFULLY SUBMITTED this 31st day of March, 2006.

ROB MCKENNA
Attorney General



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Community, Trade and Economic
Development

NO. 57253-9

COURT OF APPEALS FOR DIVISION I
STATE OF WASHINGTON

CITY OF ARLINGTON, DWAYNE LANE, and SNOHOMISH COUNTY,

Appellant,

v.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD, STATE OF WASHINGTON; 1000 FRIENDS OF WASHINGTON nka FUTUREWISE; STILLAGUAMISH FLOOD CONTROL DISTRICT; PILCHUCK AUDUBON SOCIETY; THE DIRECTOR OF THE STATE OF WASHINGTON DEPARTMENT OF COMMUNITY, TRADE AND ECONOMIC DEVELOPMENT; and AGRICULTURE FOR TOMORROW,

Respondent.

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the state of Washington that on the 31st day of March, 2006, I caused a true and correct copy of the Response Brief of the Director of the State of Washington Department of Community and Trade and Economic Development to be served on the following in the manner indicated:

Office of Clerk Court of Appeals – Division I One Union Square 600 University Street Seattle, WA 98101-1176	☒ Via ABC Legal Messenger

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DATED this 31st day of March, 2006, at Olympia, Washington.

Sandra K. Anderson

APPENDIX A

2001 WL 244384
105 Wash.App. 1016
(Cite as: 2001 WL 244384 (Wash.App. Div. 1))

NOTE: UNPUBLISHED OPINION, SEE RCWA 2.06.040

Court of Appeals of Washington, Division 1.

Dwayne LANE, Appellant,
v.
CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD, State of Washington,
Respondent,
Snohomish County, Intervenor/Respondent.

No. 46773-5-I.

March 12, 2001.

Appeal from Superior Court of Snohomish County Docket, No. 99-2-03528-1, judgment or order under review, date filed 05/26/2000; Gerald L. Knight, Judge.

Todd C. Nichols, Cogdill & Carter, Everett, WA, for appellant(s).

Marjorie A. Smitch, Ofc of Attorney General, Olympia, WA; Barbara J. Dykes, Snohomish Cnty Pa's Offc, Everett, WA, for respondent(s).

Unpublished Opinion

COLEMAN.

*1 In 1995, Snohomish County dedesignated Island Crossing as agricultural land under the Growth Management Act of 1990(GMA) and included it in the City of Arlington's urban growth area (UGA). On appeal, the Snohomish County Superior Court determined that substantial evidence in the record did not support that decision and remanded the case for further consideration. In 1998, after the remand, the County redesignated Island Crossing as agricultural resource land and removed it from Arlington's UGA. The Central Puget Sound Growth Management Hearings Board affirmed the County, and Dwayne Lane appealed that decision.

Lane failed to show that the Board made a legal error or that its decision was arbitrary and capricious. Further, the record contains substantial evidence to support the Board's decision that the County's designation of Island Crossing as agricultural resource land was not clearly erroneous. Thus, Lane failed to satisfy his burden of showing that the Board's action was invalid. Accordingly, we affirm.

STATEMENT OF FACTS

The land involved in this appeal is approximately 246 acres in Snohomish County bordering the interchange of Interstate 5 and State Road 530. This land, which is part of Island Crossing, was designated and zoned agricultural in 1978. In 1995, Snohomish County adopted a comprehensive plan under the GMA. As part of that plan, the County dedesignated Island Crossing as agricultural land and included it in Arlington's UGA. The Board affirmed that decision. *Sky Valley v. Snohomish County,* No. 95-3-0068c (Final Decision and Order), 1996 WL 734917, pt. 8 of 10, at * *86-87 (Wash. Cent. Puget Sound Growth Mgmt. Hr'gs Bd. Mar. 12, 1996).

In 1997, the Snohomish County Superior Court reviewed the Board's decision to affirm the County's action and determined that substantial evidence in the record did not support the dedesignation of Island Crossing as agricultural land and the inclusion of the land in the UGA. [FN1] The Superior Court therefore ordered 'a remand to the Board for detailed examination and at its discretion, entry of findings on Growth Management Act criteria with respect to the ... Island Crossing areas, including any landowner requests for deletion therein.' (Underlined text is handwritten in original.) In the Superior Court's oral decision, which it incorporated into its written order, it found that Island Crossing 'is in active/productive use for agricultural crops on a commercial scale' and that the area is not characterized by urban development growth under GMA standards. In response to the Superior Court's decision, the Board ordered the County to conduct additional public hearings on this issue.

FN1. *Snohomish County v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd.,* No. 96-2-03675-5 (Snohomish County Sup.Ct. Nov. 19, 1997).

On April 29, 1998, the Snohomish County Planning and Development Services Department issued a memorandum detailing the County's decision process and inviting all interested parties to submit additional information regarding whether Island Crossing should be designated as agricultural land. In response, citizens and interest groups submitted 29 letters that either supported or opposed the designation of Island Crossing as agricultural land. The Snohomish County Planning Commission held a public hearing on June 23, 1998, and accepted testimony in person, but was unable to reach a

majority recommendation. On August 19 and 26, 1998, and September 2 and 9, 1998, the Snohomish County Council held public hearings to take additional oral testimony. After considering the oral and written testimony and the Planning Commission's public hearing record, the County Council passed two ordinances redesignating Island Crossing as agricultural resource land and removing it from Arlington's UGA. In these ordinances, the County Council found that Island Crossing 'is devoted to agriculture ... (and) is actually used or is capable of being used as agricultural land.' Ex. 3, Ordinance 98-069 at 7. It also found that '(m)ost of the area is in current farm use with interspersed residential and farm buildings.' Ex. 3, Ordinance 98-069 at 7. Shortly thereafter, the Snohomish County Executive approved these ordinances.

*2 Dwayne Lane, the owner of 15 acres of land bordering Interstate 5 in Island Crossing, challenged the County's designation of Island Crossing as agricultural resource land. [FN2] Lane, who had planned to locate an automobile dealership on his land in Island Crossing, maintained that Island Crossing was better suited for urban growth. He filed a petition for review of the County's 1998 decision with the Board, contending that the County failed to comply with the GMA. The Board concluded that the County complied with the GMA, and the Superior Court affirmed the Board's decision. Lane appeals.

> FN2. Although there is a portion of Island Crossing that Lane did not challenge, we refer to the 246-acre disputed area simply as 'Island Crossing.'

BACKGROUND

'The GMA requires local governments ... to adopt comprehensive growth management plans and development regulations in accordance with the Act's provisions.' *King County v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd.*, 142 Wn.2d 543, 14 P.3d 133, 135 (2000) (citing RCW 36.70A.040). 'The Board is charged with adjudicating GMA compliance, and, when necessary, with invalidating noncompliant comprehensive plans and development regulations.' *King County*, 14 P.3d at 138 (citing RCW 36.70A.280, -.302). The local government's action is presumed to be valid. RCW 36.70A.320(1). The GMA requires the Board to find that the local government complied with the GMA unless the Board determines that the local government's action is 'clearly erroneous in view of the entire record before the board and in light of the goals and requirements of (the GMA).' RCW 36.70A.320(3). One of the GMA's goals is to encourage the conservation of productive forest lands and productive agricultural lands, and discourage incompatible uses. RCW 36.70A.020(8). Other goals are to encourage development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner and to encourage economic development. RCW 36.70A.020(1), (5). The GMA does not prioritize any of its goals. RCW 36.40A.020.

The Administrative Procedure Act (APA), chapter 34.05 RCW, governs judicial review of a final Board decision. RCW 36.70A.300(5). Under the APA, Lane bears the burden of showing that the Board's action was invalid. RCW 34.05.570(1)(a). Because Lane asserts the invalidity of an agency order resulting from an adjudicative proceeding, RCW 34.05.570(3) applies. Under this subsection, this court may grant relief if the Board 'has erroneously interpreted or applied the law(,)' if the Board's decision 'is arbitrary or capricious(,)' or if the Board's decision 'is not supported by evidence that is substantial when viewed in light of the whole record before the court(.)' RCW 34 .05.570(3)(d), (i), (e).

DISCUSSION

I. The Superior Court's Findings of Fact

Lane contends that the County and the Board committed legal error by accepting and adopting as verities findings by the Superior Court describing Island Crossing as agricultural and not urban. Lane further contends that the Board's determination which concluded that the County's decision to designate Island Crossing as agricultural land was not clearly erroneous is arbitrary and capricious because the County and the Board attributed undue deference to the Superior Court's findings of fact. [FN3]

> FN3. For the first time in his reply brief, Lane argues that the administrative proceedings in this case violated his due process rights and the appearance of fairness doctrine. We decline to address these issues. See *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) ('An issue raised and argued for the first time in a reply brief is too late to warrant consideration.').

*3 This court reviews an alleged error of law de novo based on the administrative record. *Girton v.*

City of Seattle, 97 Wn.App. 360, 363, 983 P.2d 1135 (1999), *review denied*, 140 Wn.2d 1007 (2000). A decision is arbitrary or capricious under RCW 34.05.570(3)(i) if it is a "willful and unreasoning action, taken without regard to or consideration of the facts and circumstances surrounding the action.' *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd.*, 136 Wn.2d 38, 46-47, 959 P.2d 1091 (1998) (quoting *Kendall v. Douglas, Grant, Lincoln & Okanogan Counties Pub. Hosp. Dist. No. 6*, 118 Wn.2d 1, 14, 820 P.2d 497 (1991)).

> '(A)lthough in nonadministrative proceedings the finder of fact is the trial court, in administrative proceedings facts are established at the administrative hearing and the superior court acts as an appellate court.' *Waste Mgmt. of Seattle, Inc. v. Utils. & Transp. Comm'n*, 123 Wn.2d 621, 633, 869 P.2d 1034 (1994) (citing RCW 34.05.558). 'On factual questions the reviewing court cannot substitute its interpretation of the facts for the agency's interpretation or reweigh the evidence.' *Van Sant v. City of Everett*, 69 Wn.App. 641, 650, 849 P.2d 1276 (1993). When a superior court serving in an appellate capacity issues findings of fact and conclusions of law, the findings and conclusions should be disregarded as superfluous.

Valentine v. Dep't of Licensing, 77 Wn.App. 838, 844, 894 P.2d 1352 (1995); *Grader v. City Lynnwood*, 45 Wn.App. 876, 879, 728 P .2d 1057 (1986). Therefore, although unchallenged findings of fact made by an agency are verities on appeal, the same cannot be said for unchallenged findings of fact entered by a superior court serving in an appellate capacity. See *Tapper v. Employment Sec. Dep't*, 122 Wn.2d 397, 407, 858 P.2d 494 (1993); *Valentine*, 77 Wn.App. at 844 n. 2.

The Superior Court ordered the remand to the Board for additional evidence on the character of Island Crossing after it determined that substantial evidence in the record did not support the dedesignation of Island Crossing as agricultural land and the inclusion of the land in the UGA. In its opinion, the Superior Court found that the Island Crossing area is not characterized by urban development. Instead, it found that Island Crossing is currently used as agricultural land. The Superior Court then suggested that the County improperly prioritized economic development over preservation of agricultural lands. During the remand, the attorney for the County argued to the Board that the findings of fact entered by the Superior Court serving in an appellate capacity were verities because they had not been appealed. [FN4] Although the Board did not address this erroneous argument, Lane points to the Board's findings that he maintains parallel the Superior Court's findings as evidence that the County and the Board indeed accepted the Superior Court's findings as verities. Further, Lane notes that the Board's ruling cites to the Snohomish County Superior Court's 1997 oral ruling.

> FN4. During oral argument before this court, the County's appellate attorney acknowledged that this argument was erroneous.

*4 The crux of Lane's argument is that the County and the Board simply adopted the Superior Court's findings of fact and failed to examine the evidence presented during the remand. Indeed, the record reflects that the findings entered by the County and the Board regarding Island Crossing being devoted to agriculture and current farm use are similar to the Superior Court's findings. But the findings are not verbatim. Moreover, mere similarity between the findings does not indicate that the County or the Board failed to consider the evidence presented during the remand and make findings thereon or in any way failed to provide procedural safeguards to Lane during the remand. Although the County's attorney urged the Board to defer to the Superior Court's findings, Lane points to nothing in the record to suggest that the Board actually did so. We decline to conclude that the Board erroneously interpreted or applied the law based solely on the inaccuracy of arguments presented to it.

Further, although the Board did cite to the Superior Court's findings relating to the distance from Island Crossing to Arlington, it did so only to clarify the Superior Court's factual ambiguity. The Superior Court stated that Island Crossing is 'separated from the nearest city, the city of Arlington, by two miles of agricultural/rural landscape.' But the Board pointed out that Island Crossing is approximately one mile not two miles from Arlington, though the shortest distance by road is two miles. In doing so, the Board cited the Superior Court's findings. The finding was cited only for purposes of clarification.

It is important to note, however, that even though the Superior Court's findings of fact are not verities, its legal conclusions were binding on the County and the Board. For example, the Superior Court concluded that substantial evidence in the record did not support the dedesignation of Island Crossing as agricultural land and the inclusion of the land in the UGA. The Superior Court also concluded that the Board erred by prioritizing economic development over

preservation of agricultural lands. Thus, after numerous remand hearings following the Superior Court's ruling, the County and the Board properly considered new evidence and reevaluated the character of Island Crossing without improper emphasis on economic development. After reviewing the evidence independently and keeping in mind that its findings of fact had to be supported by substantial evidence in the record, the County reached a new conclusion redesignating Island Crossing as agricultural land. The Board then independently considered the record and determined that the County's conclusion was not clearly erroneous.

The record does not support Lane's contentions that the County and the Board accepted the Superior Court's findings of fact as verities or that the County and the Board attributed undue deference to these findings. Rather, it is apparent from the record that neither the County nor the Board felt constrained by the Superior Court's findings of fact. Indeed, the record reflects that the County conducted a careful evaluation of the evidence following the remand. After reviewing the evidence collected during the remand, the Board independently determined that the County's dedesignation of Island Crossing as agricultural land was not clearly erroneous. Lane failed to show that this determination was invalid due to legal error. Further, Lane failed to present any evidence that the Board's determination was willful and unreasoning action, taken without regard to or consideration of the surrounding facts and circumstances. It therefore cannot be said that the Board's decision was arbitrary or capricious.

II. Agricultural Resource Land

*5 Lane contends that the record does not support the Board's decision to affirm the County's designation of Island Crossing as agricultural resource land under the GMA. [FN5]

> FN5. Lane also asserts that the Board failed to follow numerous GMA statutory provisions. Because Lane's support for this argument is essentially that the record contains evidence to support a contrary conclusion, this argument is better characterized as part of his contention that the Board's decision is not supported by substantial evidence.

In this case, the Board concluded that the County's decision to designate Island Crossing as agricultural land under the GMA was not clearly erroneous. Lane, the party asserting the error, has the burden of demonstrating to this court that the Board's decision is not supported by substantial evidence in the record. King County, 2000 WL 1838765, *4; see RCW 34.05.570(1)(a), - .570(3)(e).

> 'Agricultural land' means land primarily devoted to the commercial production of horticultural, viticultural, floricultural, dairy, apiary, vegetable, or animal products or of berries, grain, hay, straw, turf, seed, Christmas trees not subject to the excise tax imposed by RCW 84.33.100 through 84.33.140, finfish in upland hatcheries, or livestock, and that has long-term commercial significance for agricultural production.

RCW 36.70A.030(2); accord WAC 365-190-030(1). "Long-term commercial significance' includes the growing capacity, productivity, and soil composition of the land for long-term commercial production, in consideration with the land's proximity to population areas, and the possibility of more intense uses of the land.' RCW 36.70A.030(10); accord WAC 365-190-030(11). '(L)and is 'devoted to' agricultural use under RCW 36.70A.030 if it is in an area where the land is actually used or capable of being used for agricultural production.' *City of Redmond*, 136 Wn.2d at 53.

Island Crossing is composed of prime agricultural soils and has been described as having agricultural value of primary significance. Except for the County's 1995 dedesignation of Island Crossing as agricultural land, Island Crossing has been designated and zoned agricultural since 1978. Thus, the record supports a finding that Island Crossing is capable of being used for agricultural production. See *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd.*, 136 Wn.2d 38, 53, 959 P.2d 1091 (1998).

Although Island Crossing borders the interchange of Interstate 5 and State Road 530, it is separated from Arlington by farmland. Indeed, the record contains evidence to indicate that most of the land in Island Crossing is being actively farmed, except a small area devoted to freeway services. Thus, the record indicates that the land is actually used for agricultural production. See *City of Redmond*, 136 Wn.2d at 53. The only urban development permits issued for Island Crossing are for the area that serves the freeway. Further, the substantial shoreline development permit for sewer service in the freeway area explicitly 'prohibits any service tie-ins outside the Freeway Service area.' Thus, adequate public facilities and services do not currently exist. Although Lane speculates that it may be possible for him to obtain permits under exceptions to the present restrictions, he fails to demonstrate that such permits

can be provided in an efficient manner as required by statute. See RCW 36.70A.020(1).

*6 Although the record may contain evidence to support a different conclusion, this court cannot reweigh the evidence. See *Van Sant v.. City of Everett*, 69 Wn.App. 641, 650, 849 P.2d 1276 (1993). Indeed, the record contains substantial evidence supporting the conclusion that the designation of Island Crossing as agricultural land encourages the conservation of productive agricultural lands and discourages incompatible uses in accordance with the GMA. See RCW 36.70A.020(8). And the removal of Island Crossing from Arlington's UGA is consistent with the GMA's goal to encourage development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner. See RCW 36.70A.020(1). The record supports the Board's decision that the County's designation of Island Crossing as agricultural resource land was not clearly erroneous. Further, as discussed above, Lane failed to show that the Board made a legal error or that its decision was arbitrary and capricious. Thus, he failed to satisfy his burden of showing that the Board's action was invalid and, as a result, Lane is not entitled to relief.

Accordingly, we affirm.

The Central Puget Sound Growth Management Hearings Board did not participate in this appeal.

105 Wash.App. 1016, 2001 WL 244384 (Wash.App. Div. 1)

END OF DOCUMENT

APPENDIX B

SNOHOMISH COUNTY COUNCIL
SNOHOMISH COUNTY, WASHINGTON

AMENDED ORDINANCE NO. 03-063

REVISING THE EXISTING URBAN GROWTH AREA FOR THE CITY OF ARLINGTON; ADOPTING MAP AMENDMENTS TO THE GROWTH MANAGEMENT ACT COMPREHENSIVE PLAN; AND ADOPTING COUNTY-INITIATED AREA-WIDE REZONES PURSUANT TO CHAPTER 30.74 SCC; AND AMENDING AMENDED ORDINANCE 94-125, ORDINANCE 94-120, AND EMERGENCY ORDINANCE 01-047

WHEREAS, the Growth Management Act, chapter 36.70A RCW (GMA) requires Snohomish County to designate an urban growth area (UGA) within which urban growth shall be encouraged and outside of which growth can occur only if it is not urban in nature (RCW 36.70A.110(1)); and

WHEREAS, the county council designated a Final UGA for Arlington (Amended Ordinance 94-120) on June 28, 1995, after holding public hearings from April 19, 1994, through January 18, 1995, in conformance with the requirements of the GMA; and

WHEREAS, on June 28, 1995, the county council approved Amended Ordinance 94-125 which adopted a GMA Comprehensive Plan including a General Policy Plan (GPP) and Future Land Use (FLU) map; and

WHEREAS, the county council amended the Final UGA for Arlington on July 23, 2001 (Emergency Ordinance 01-047) in conformance with the requirements of the GMA; and

WHEREAS, RCW 36.70A.130 and 36.70A.470 direct counties planning under the GMA to adopt procedures for interested persons to propose amendments and revisions to the comprehensive plan or development regulations; and

WHEREAS, the county council adopted chapter 30.74 SCC to comply with the requirements of RCW 36.70A.130 and .470 to allow interested persons to propose amendments to the GMA comprehensive plan and/or development regulations; and

WHEREAS, Snohomish County Department of Planning and Development Services (PDS) staff, pursuant to the SCC 30.74.030, reviewed all proposals on the docket and determined that twenty-one of the proposals could be reviewed and analysis could be

completed within the time frame of the 2003 final docket review cycle, including the proposal by Dwayne Lane to amend the Arlington UGA boundary; and

WHEREAS, the 2003 final docket – Phase 1 includes proposals to amend the GPP FLU map submitted by Jerry Booker, City of Everett, Frank Heath, NORETEP, Snohomish County Department of Public Works, Dwayne Lane, Eddie Bauer, and Wellington Morris; and

WHEREAS, pursuant to Chapter 30.74 SCC, PDS completed final review and evaluation of the 2003 final docket – Phase 1, including rezones to implement proposals to amend the GPP FLU map, and forwarded a recommendation to the Snohomish County Planning Commission; and

WHEREAS, the planning commission held hearings on the Dwayne Lane proposal including the proposal to amend UGA boundaries, on February 25 and March 4, 2003, and forwarded a recommendation to the county council; and

WHEREAS, the county council held a public hearing on July 9, 2003, continued to July 30, August 13, and September 10, 2003, to consider the entire record and hear public testimony on Ordinance 03-063, adopting revisions to the Arlington UGA.

NOW, THEREFORE, BE IT ORDAINED:

Section 1: The county council makes the following findings of fact and conclusions:

A. The county council hereby adopts and incorporates by reference the findings and conclusions adopted and the legislative records developed in adopting Amended Ordinance 94-120, Amended Ordinance 94-125, Ordinance 97-076, and Emergency Ordinance 01-047.

B. The proposal by Dwayne Lane to amend the FLU map of the GPP to expand the Arlington UGA to include 110.5 acres to be redesignated from Riverway Commercial Farmland and Rural Freeway Service to Urban Commercial and rezone 110.5 acres from Rural Freeway Service and Agriculture-10 Acres to General Commercial more closely meets the policies of the GPP than the existing plan designation based on the planning commission's following findings of fact and conclusions:

1. When Dwayne Lane purchased the subject property, the General Policy Plan designation was Urban Commercial.
2. Water and sanitary sewer lines running along the west side of Smokey Point Boulevard are available adjacent to the subject property. This

system is owned by the City of Arlington which has invested in utilities in the area because it believes the area is "destined for more intense urban development."

3. The Island Crossing freeway interchange currently supports commercial uses.
4. The subject property is adjacent to Interstate-5, SR 530, and Smokey Point Boulevard.
5. The permit process for commercial projects requires higher development standards for critical areas than is the case for development on agricultural lands. The 150 foot buffer requirements associated with new commercial development will better preserve Portage Creek.
6. Ragnar soils are the best soils for production of commercial crops and there are no Ragnar soils at Island Crossing. The Island Crossing area consists primarily of Puget soils that are adequate for hay, green chop and pasture, but are not suitable for more valuable crops like berries and corn. The Puget soils are considered "prime" only when artificially drained, which the land at the site is not, and even when drained the Puget series is considered of low productivity.
7. Farming is no longer financially viable at Island Crossing. Busy highways, high assessed value, small parcel size and safety issues eliminate the viability of the Island Crossing Interchange site as agricultural land.
8. Snohomish County is growing rapidly and it is inevitable that sites like Island Crossing will be converted from agricultural uses to commercial uses.
9. The Commission has concerns about the history of floods in this area and the associated impacts. However, the Commission believes that the impacts can be mitigated as is clearly shown in the DSEIS.
10. The Commission also has concerns about traffic impacts at Island Crossing as a result of future urban development. The Commission believes that the impacts can be mitigated. The DSEIS shows that traffic impacts can be fully mitigated.

C. The proposed expansion to the Arlington UGA is consistent with GPP Policies LU 1.A.3 and LU 2.C.3, which require that new development within UGAs are provided with adequate infrastructure and services, including sanitary sewers.

D. The proposed area-wide rezone (Exhibit C, Map 7a) is consistent with the following initial criteria for rezone requests in SCC 30.74.040:

1. Where applicable, the proposed rezones are necessary because an amendment to the future land use map of the GPP has also been proposed that meets the initial evaluation criteria listed in SCC 30.74.030.
2. Public facilities and services necessary for development are available or programmed to be provided to the sites of the proposed rezones, consistent with the GMA comprehensive plan or development regulations as determined by applicable service providers.
3. The proposed rezones do not require a concurrent site plan approval because there is an absence of special site conditions and applicable GPP or subarea policies.

E. The proposed area-wide rezone (Exhibit C, Map 7a) is consistent with the GMA comprehensive plan and consistent with the provisions of the GMA.

F. The county council concludes that the proposed area-wide rezone (Exhibit C, Map 7a) implements the county's GMA comprehensive plan.

G. The county council concludes that the proposed area-wide rezone (Exhibit C, Map 7a) bears a substantial relationship to the public health, safety and welfare.

H. The proposed UGA amendment is consistent with the following final review and evaluation criteria of SCC 30.74.060:
1. The proposed amendment maintains consistency with other elements of the GMA comprehensive plan;
2. All applicable elements of the GMA comprehensive plan support the proposed amendment;
3. The proposed amendment meets the goals, objectives, and policies of the GMA comprehensive plan as discussed in the specific findings; and
4. The proposed UGA amendment is consistent with the countywide planning policies.

I. The amendment to the GMA comprehensive plan satisfies the procedural and substantive provisions of and is consistent with the GMA.

J. The amendment maintains the GMA comprehensive plan's consistency with the multi-county policies adopted by the Puget Sound Regional Council and with the countywide planning policies for Snohomish County.

K. Cities have been notified and consulted with regarding proposed amendments that affect UGAs or GPP FLU map designations within UGAs.

L. There has been early and continuous public participation in the review of the proposed amendments.

M. A Draft Supplemental Environmental Impact Statement (DSEIS) was issued on February 19, 2003, for the Dwayne Lane proposal. A Final SEIS, including response to comments on the DSEIS, was prepared following the 30-day comment period and was issued on July 1, 2003. The purpose of the SEIS was to analyze potential significant adverse environmental impacts of the proposals and any alternatives that were not previously identified in the two EIS documents and a series of addenda prepared for the Snohomish County GMA Comprehensive Plan – General Policy Plan and Transportation Element between 1994 and 2003.

N. The recommended amendments are within the scope of analysis contained in the SEIS and associated adopted environmental documents and result in no new significant adverse environmental impacts. The SEIS performs the function of keeping the public apprised of the refinement of the original GMA comprehensive plan proposal by adding new information, but does not substantially change the analysis of significant impacts and alternatives analyzed in the existing adopted environmental documents.

O. The SEPA requirements with respect to this proposed action have been satisfied by these documents.

P. The county council held a public hearing on July 9, 2003, continued to July 30, August 13, and September 10, 2003, to consider the planning commission's recommendations.

Q. The public was notified of the public hearings held by the planning commission and the county council by means of published legal notices in The (Everett) Herald and local newspapers.

R. The proposal has been broadly disseminated and opportunities have been provided for written comments and public hearing after effective notice.

S. Approval of the Island Crossing Interchange Docket Proposal is not precedent for redesignation of Agricultural land in the Stillaguamish Valley. This proposal is approved entirely on its own merits. These include:
(1) This proposal is supported by the Snohomish County Planning Commission.
(2) Bringing this land into the Arlington Urban Growth Area is fully supported by the City of Arlington.
(3) This proposal is supported by the Stillaguamish Tribe.

(4) This land is located at an I-5 interchange between an interstate highway and a state highway, and is uniquely located for commercial needs of the area.

(5) This land has unique access to utilities. Redesignation of adjacent properties to the east will not occur because utilities are unavailable to the east.

T. The land contained within the Island Crossing Interchange Docket Proposal is not agricultural land of long term commercial significance. Although some of the soils may be of a type appropriate for agricultural use, soil type is only one factor among many others in the legal test for agricultural land of long term commercial significance. The County Council has addressed the question as to whether the land is:

> "primarily devoted to the commercial production of agricultural products and has long term commercial significance for agricultural production"

and has found that it is not.

At the public hearing, the testimony of Mrs. Roberta Winter (Exh. 111) was very persuasive on this point. Since the mid-1950's, she and her husband had a dairy farm in the very location of the Island Crossing Interchange Docket Proposal site. Locating and then expanding I-5 put them out of the dairy business. They soon discovered that crops generated less revenue than the property taxes. The Winters ~~sold the land because the land could not be profitably farmed.~~

Council finds that this land cannot be profitably farmed, and is not agricultural land of long term commercial significance.

U. The Island Crossing Interchange Docket Proposal site has episodically flooded in the past and will continue to episodically flood in the future, whether or not the proposal is approved, and whether or not the site is developed. The relevant question is not whether the proposal site experiences floods, but rather does the site experience significant adverse flood impacts which cannot be reasonably mitigated.

The Draft Supplemental Environmental Impact Statement (Exh. 22) clearly states, at p. 2-24:

> Assuming effective implementation of applicable regulations and recommended mitigation measures, no significant unavoidable adverse surface water quantity or quality impacts would be anticipated associated with the future development of the site.

V. In Exh. 135, applicant of the Island Crossing Interchange Docket Proposal states various development techniques and plans which will be voluntarily used to minimize the prospect of flood impacts. These techniques include the following:

- Excavation to create additional storage.
- Building pads and access roads will only be filled to the 100-year floodplain level.
- Minimize the amount of fill brought on-site.
- Most fill will be excavated onsite.
- Water passage to South Slough and Portage Creek will remain unimpeded.
- Parking lots will be built below Base Flood Elevation.
- Parking lots may be built of permeable surface.
- Impermeable surface will be minimized.

Section 2. The county council bases its findings of facts and conclusions on the entire record of testimony and exhibits, including all written and oral testimony before the planning commission and county council.

Section 3. The county council hereby amends Amended Ordinance 94-120 as adopted on June 28, 1995, last amended by Emergency Ordinance 01-047 as adopted on July 23, 2001, to modify Exhibits A and C which were therein incorporated. The county council hereby adopts two new exhibits for Amended Emergency Ordinance 01-047: (1) Exhibit A, Map 7 ("Proposed Comprehensive Plan Amendment, Dwayne Lane") which is a map that depicts the modified UGA boundary for the Arlington UGA; and (2) Exhibit C which is a county assessor's map that accurately depicts the revised UGA boundary for the Arlington UGA. Exhibits A and C are attached hereto and incorporated herein by this reference. After the effective date of Ord. 03-063, development in the Island Crossing Interchange Docket Proposal area added to the Arlington UGA by Ord. 03-063 should be conditioned upon use of the flood protection measures outlined above in finding V of Section 1, provided such flood protection measures are technically feasible and do not defeat the purpose of the development.

Section 4. Based on the foregoing findings and conclusions, the Snohomish County GMA Comprehensive Plan Future Land Use Map adopted as Map 4 of Exhibit A in Section 4 of Amended Ordinance No. 94-125 on June 28, 1995, and last amended by Ordinance No. 03-001 on January 27, 2003, is amended as depicted in Exhibit A, Map 7 which is attached hereto and incorporated by reference into this ordinance as if set forth in full.

Section 5. Based on the foregoing findings and conclusions, the county council hereby adopts the area-wide rezone as mapped in the following documents which are attached hereto and incorporated by reference into this ordinance as if set forth in full:

A. Assessor map showing the rezone incorporated herein as Exhibit C; and

B. Map 7a and incorporated herein as Exhibit B.

Section 6. Severability. If any provision of this ordinance is held invalid or unconstitutional, such invalidity or unconstitutionality shall not affect the validity or constitutionality of the remainder of this ordinance. Provided, however, that if any provision of this ordinance is held invalid or unconstitutional, then the provision in effect prior to the effective date of this ordinance shall be in full force and effect for that individual provision as if this ordinance had never been adopted.

PASSED this 10th day of September, 2003.

SNOHOMISH COUNTY COUNCIL
Snohomish County, Washington

Gary Nelson, Council Chair

ATTEST:

Sheila McCallister
Clerk of the County Council, asst.

( ) Approved
( ) Emergency
(V) Vetoed

Date 9/26/03

Robert J. Drewel
County Executive

APPROVAL AS TO FORM ONLY

Deputy Prosecuting Attorney

ATTEST:

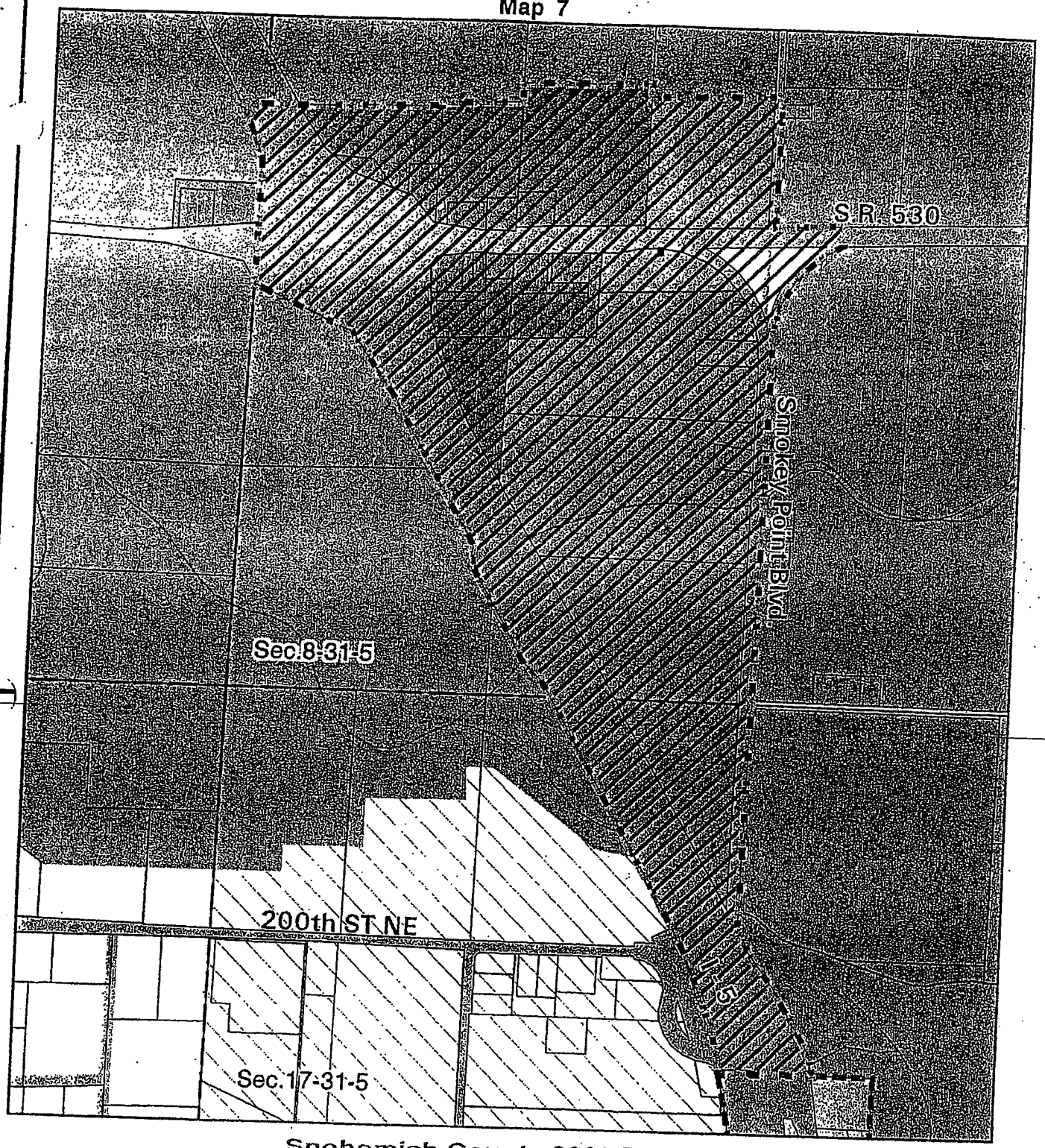
Laura Nelson Date 9/26/03

Veto Overridden on Oct. 22, 2003
by a vote of four to one

Chair

Clerk of the Council

Map 7



Snohomish County 2003 Docket

Proposed Comprehensive Plan Amendment

Dwayne Lane

Snohomish County

January 2003

LEGEND

Existing County Plan Designations

- Riverway Commercial Farmland
- Rural Residential (1 DU/5 Acres Basic)
- Urban Low Density Residential (4 - 6 DU/Acre)
- Rural Freeway Service
- Tribal Trust Lands
- Rural/Urban Transition Area

Proposed Plan Amendment

Dwayne Lane:
Redesignate Riverway Commercial Farmland, and Rural Freeway Service to Urban Commercial

Expand Arlington UGA.

- Incorporated Cities
- Existing Urban Growth Area Bdy.

This map is a graphic representation derived from the Snohomish County Geographic Information System. It does not represent survey accuracy. Property lines are for illustrative purposes and depict only generalized parcels.
Produced by Snohomish County Planning Div., GIS Team;cbl;
c:/dock/dock03/lane-flu_map7-050503.aml

Scale in Feet
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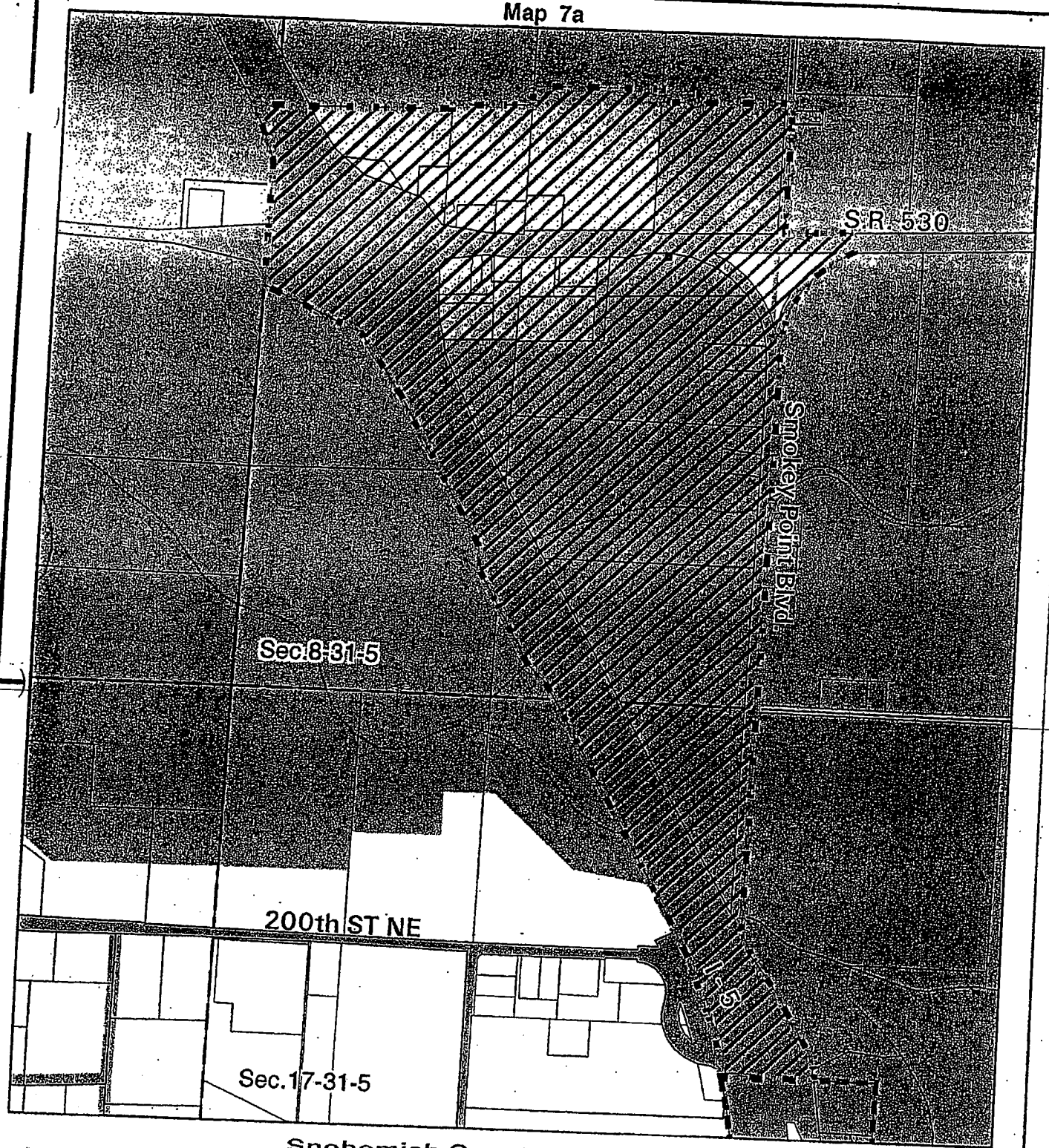
Map 7a



Snohomish County 2003 Docket
Implementing Rezone
Dwayne Lane

Snohomish County

January 2003

LEGEND

Existing Zoning

- Agriculture-10 Acre
- Rural-5 Acre
- Rural Freeway Service
- Tribal Trust Lands

Proposed Rezone

- Dwayne Lane: Rezone from Rural Freeway Service and Agriculture-10 Acre to General Commmercial
- Expand Arlington UGA.

- Incorporated Cities
- Existing Urban Growth Area Bdy.

This map is a graphic representation derived from the Snohomish County Geographic Information System. It does not represent survey accuracy. Property lines are for illustrative purposes and depict only generalized parcels.
Produced by Snohomish County Planning Div., GIS Team;cbl;
c:/dock/dock03/lane_rez.ami

Scale in Feet
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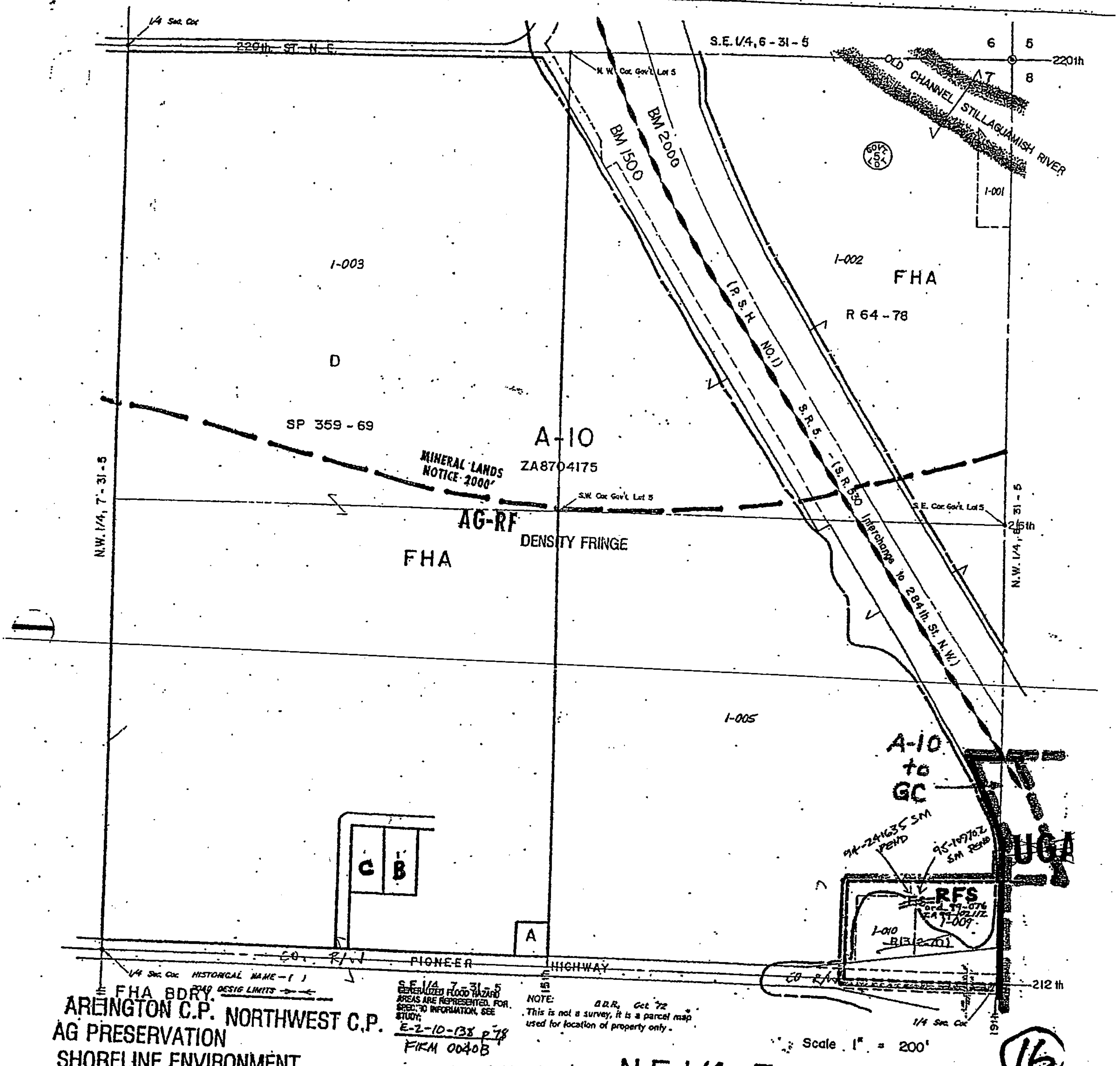
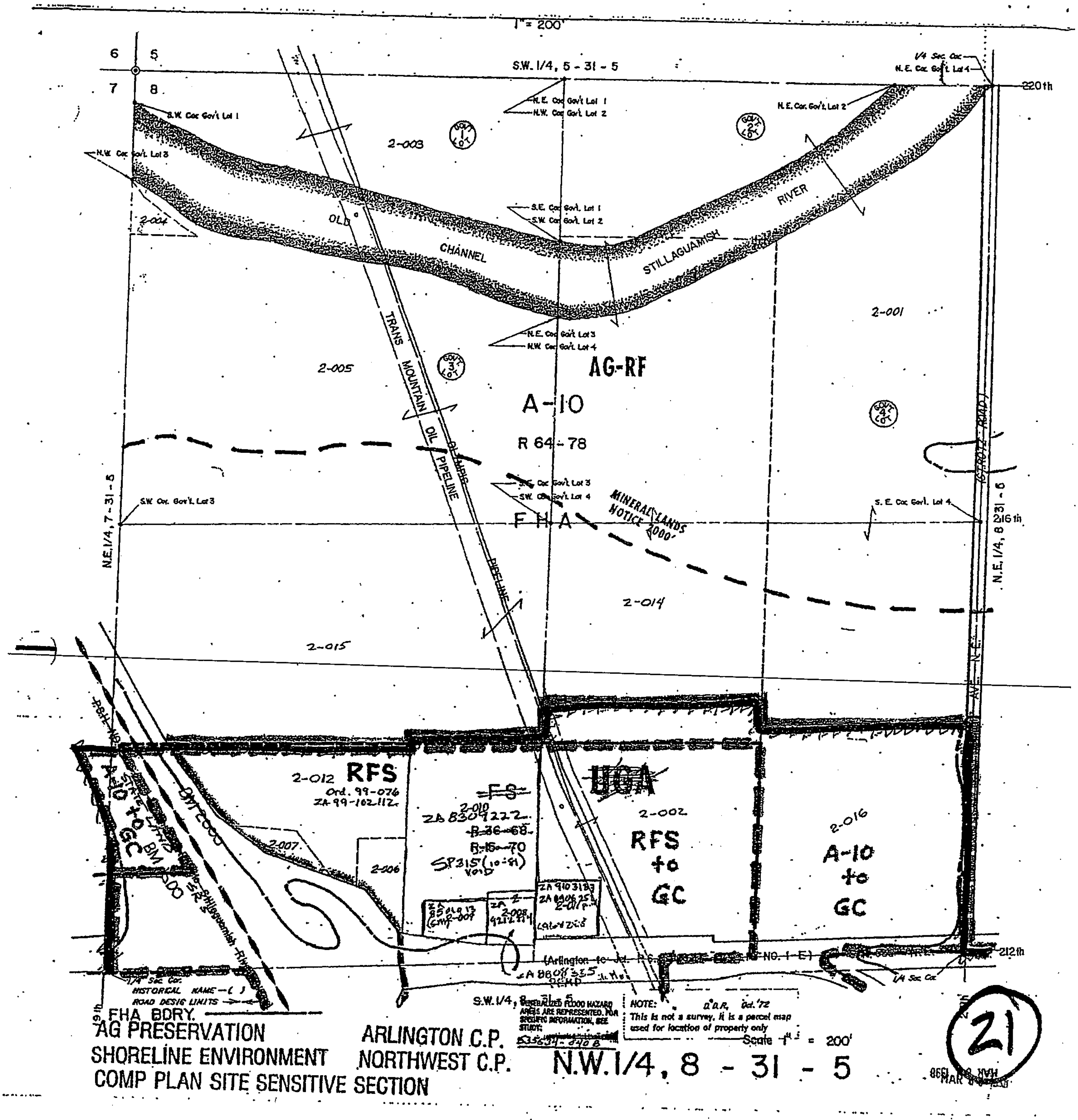


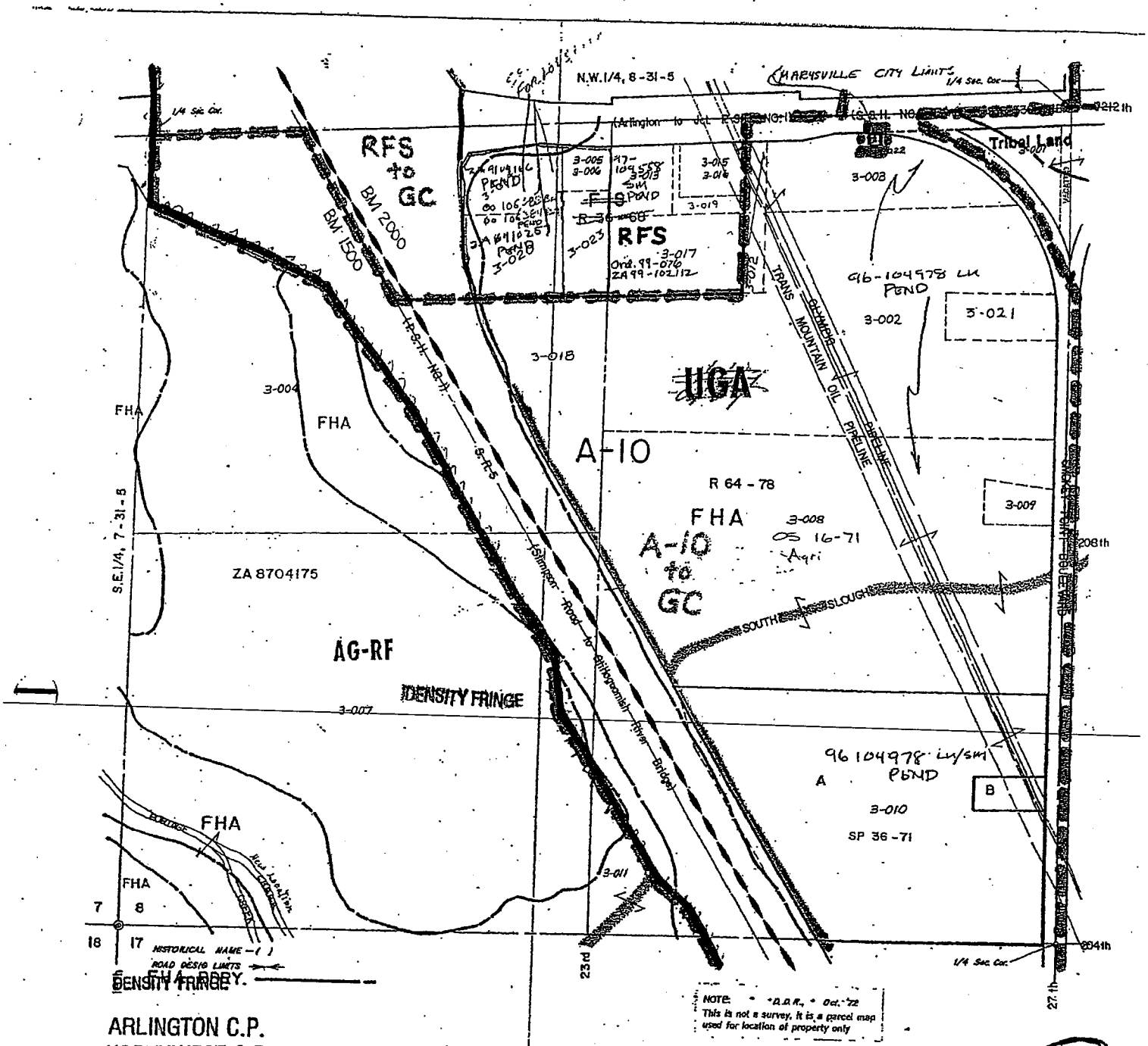
ARLINGTON C.P. NORTHWEST C.P.
AG PRESERVATION
SHORELINE ENVIRONMENT
COMP PLAN SITE SENSITIVE SECTION

DENSITY FRINGE **N.E. 1/4, 7 - 31 - 5**

THIS 1/4 "ENVIRONMENTALLY SENSITIVE"

MAY 0 4 1998


1" = 200'
S.W. 1/4, 5 - 31 - 5
220th
216th
212th
TRANS MOUNTAIN OIL PIPELINE
OLD CHANNEL
STILLAGUAMISH RIVER
MINERAL LANDS NOTICE 2000'
AG-RF
A-10
R 64-78
FHA
2-003
2-005
2-001
2-014
2-015
2-004
2-012 RFS
Ord. 99-076
ZA-99-102112
2-010
ZA 8309222
SP315 (10-91) VOID
UGA
2-002
RFS to GC
2-016
A-10 to GC
A-10 to GC
2-007
2-006
N.E. 1/4, 7 - 31 - 5
N.E. 1/4, 8 - 31 - 5
1/4 Sec. Cor.
HISTORICAL NAME — ( )
ROAD DESIG LIMITS
FHA BDRY.
S.W. 1/4, 8 - 31 - 5
GENERALIZED FLOOD HAZARD AREAS ARE REPRESENTED. FOR SPECIFIC INFORMATION, SEE STUDY.
NOTE: D.A.R. Oct. '72
This is not a survey. It is a parcel map used for location of property only
Scale 1" = 200'
AG PRESERVATION
SHORELINE ENVIRONMENT
COMP PLAN SITE SENSITIVE SECTION
ARLINGTON C.P.
NORTHWEST C.P.
N.W. 1/4, 8 - 31 - 5
21



ARLINGTON C.P.
NORTHWEST C.P.
AG PRESERVATION
SHORELINE ENVIRONMENT
COMP PLAN SITE SENSITIVE SECTION

GENERALIZED FLOOD HAZARD AREAS ARE REPRESENTED. FOR SPECIFIC INFORMATION, SEE STUDY: 635934-00408

Scale 1" = 200'

S.W. 1/4, 8 - 31 - 5

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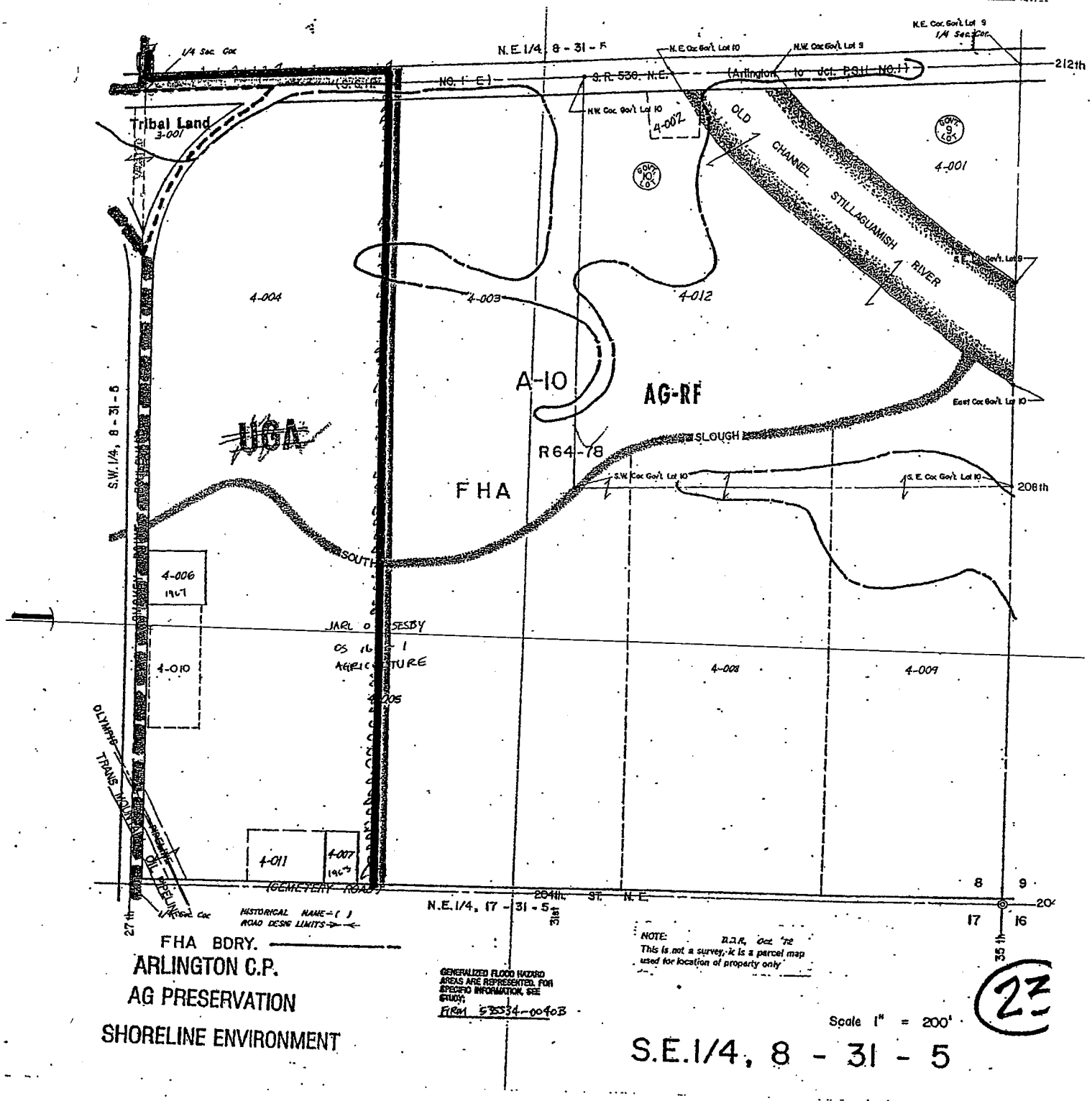
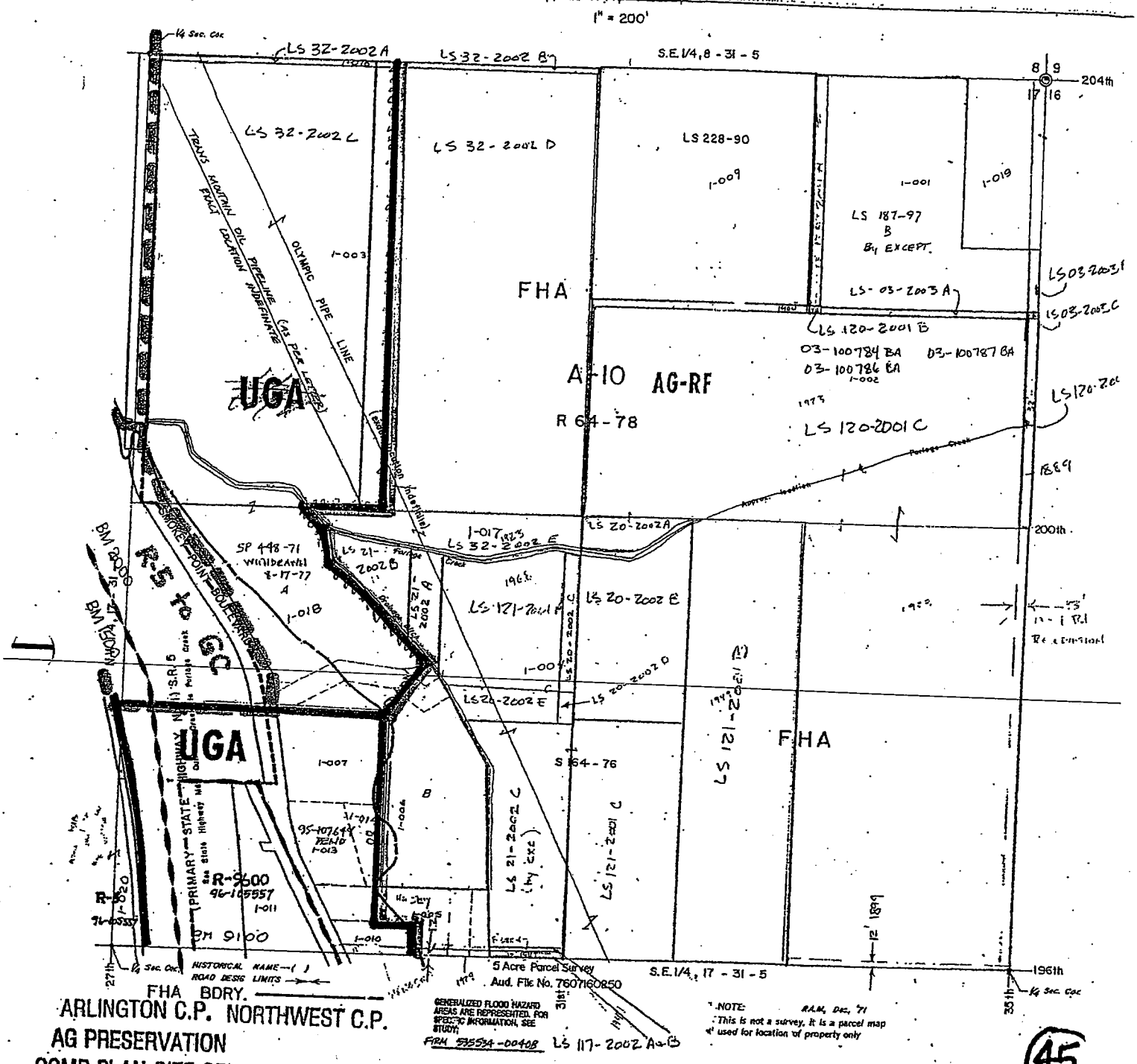
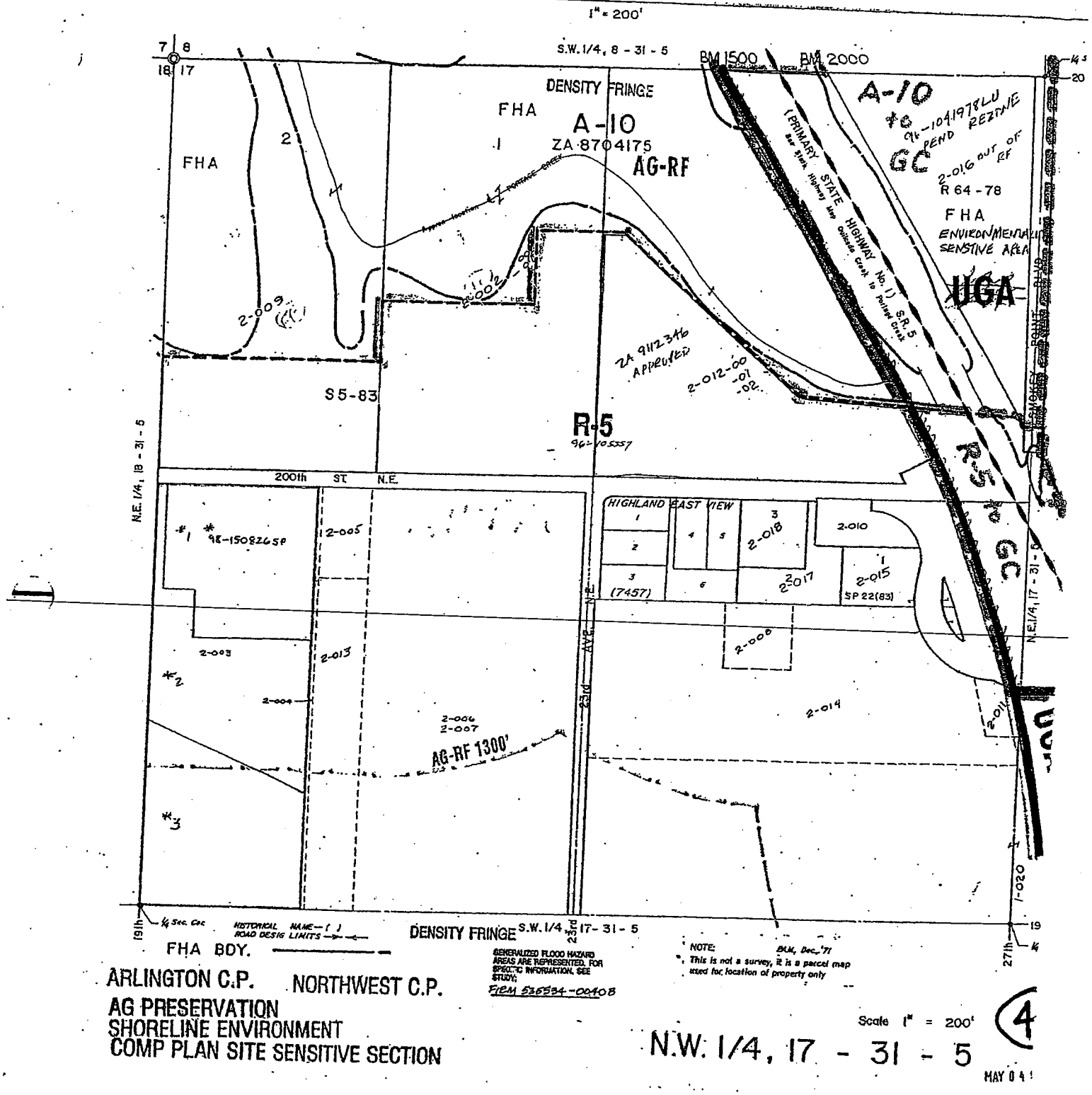

N.E. 1/4, 8 - 31 - 5
1/4 Sec. Cor
N.E. Cor. Gov't Lot 9
1/4 Sec. Cor.
N.E. Cor Gov't Lot 10
N.W. Cor Gov't Lot 9
212th
S.R. 530, N.E.
(Arlington to Jct. P.S.H. NO. 11)
NO. 1 E.)
N.W. Cor. Gov't Lot 10
4-002
Tribal Land
3-001
OLD
CHANNEL
STILLAGUAMISH
RIVER
GOVT LOT 9
GOVT LOT 10
4-001
4-004
4-003
4-012
A-10
AG-RF
UGA
R64-78
SLOUGH
FHA
S.W. Cor Gov't Lot 10
S.E. Cor Gov't Lot 10
208th
East Cor Gov't Lot 10
S.W. 1/4, 8 - 31 - 5
SOUTH
4-006
1967
4-010
JARL O SESBY
OS 16 - 1
AGRICULTURE
4-005
4-008
4-009
OLYMPIC PIPE LINE
TRANS MOUNTAIN
OIL PIPE LINE
4-011
4-007
1967
CEMETERY ROAD
204th ST. N.E.
N.E. 1/4, 17 - 31 - 5
8
9
17
16
20
27th
31st
35th
1/4 Sec. Cor
HISTORICAL NAME = ( )
ROAD DESIG. LIMITS
FHA BDRY.
ARLINGTON C.P.
AG PRESERVATION
SHORELINE ENVIRONMENT
NOTE: D.N.R. Oct '72
This is not a survey, it is a parcel map used for location of property only
GENERALIZED FLOOD HAZARD AREAS ARE REPRESENTED. FOR SPECIFIC INFORMATION, SEE STUDY:
FIRM 535534-0040B
Scale 1" = 200'
S.E. 1/4, 8 - 31 - 5
22



ARLINGTON C.P. NORTHWEST C.P.
AG PRESERVATION
COMP PLAN SITE SENSITIVE SECTION


1" = 200'
S.W. 1/4, 8 - 31 - 5
BM 1500
BM 2000
DENSITY FRINGE
FHA
A-10
ZA-8704175
AG-RF
A-10
96-104 1978LU
PEND REZONE
GC
2-016 OUT OF RF
R 64-78
FHA
ENVIRONMENTALLY SENSITIVE AREA
UGA
PRIMARY STATE HIGHWAY No. 1 S.R. 5
ZA 9112346
APPROVED
2-012-00
-01
-02
S5-83
R-5
96-105357
200th ST. N.E.
N.E. 1/4, 18 - 31 - 5
HIGHLAND EAST VIEW
2-005
2-003
2-013
2-004
2-006
2-007
AG-RF 1300'
23rd AVE. N.E.
2-018
2-010
2-017
2-015
SP 22(83)
2-008
2-014
2-020
N.E. 1/4, 17 - 31 - 5
DENSITY FRINGE
S.W. 1/4, 17 - 31 - 5
FHA BDY.
HISTORICAL NAME-( )
ROAD DESIG LIMITS
GENERALIZED FLOOD HAZARD AREAS ARE REPRESENTED. FOR SPECIFIC INFORMATION, SEE STUDY:
FIRM 536534-0040B
NOTE: BLM, Dec., '71
This is not a survey, it is a parcel map used for location of property only
ARLINGTON C.P.
NORTHWEST C.P.
AG PRESERVATION
SHORELINE ENVIRONMENT
COMP PLAN SITE SENSITIVE SECTION
Scale 1" = 200'
N.W. 1/4, 17 - 31 - 5
4
MAY 04

APPENDIX C

CENTRAL PUGET SOUND
GROWTH MANAGEMENT HEARINGS BOARD
STATE OF WASHINGTON

1000 FRIENDS OF WASHINGTON, STILLAGUAMISH FLOOD CONTROL DISTRICT, AGRICULTURE FOR TOMORROW, PILCHUCK AUDUBON SOCIETY; and THE DIRECTOR OF THE STATE OF WASHINGTON DEPARTMENT OF COMMUNITY, TRADE AND ECONOMIC DEVELOPMENT, Petitioners, v. SNOHOMISH COUNTY, Respondent, and DWAYNE LANE, Intervenor.	**Case No. 03-3-0019c** **CORRECTED FINAL DECISION AND ORDER**

I. SYNOPSIS

In October of 2003, five organizations[1] filed Petitions for Review with the Growth Management Hearings Board alleging that Snohomish County Ordinance No. 03-063 was not guided by the goals of the Growth Management Act and did not comply with the requirements of the GMA. Ordinance No. 03-063 made three changes to the County's comprehensive land use plans and development regulations relative to a 110.5 acre unincorporated area referred to as Island Crossing: (1) it changed the land use

[1] The organizations challenging the County's action included 1000 Friends of Washington, the Washington State Department of Community, Trade and Economic Development, and the Stillaguamish Flood Control District.

designations for 75.5 acres of "Riverway Commercial Farmland" and 35.5 acres of "Rural Freeway Service" to "Urban Commercial;" (2) it rezoned these lands from "Rural Freeway Service" and "Agriculture-10 Acres" to "General Commercial," and (3) it revised the urban growth area boundary to include the entirety of the Island Crossing area within the urban growth area for the City of Arlington. Joining Snohomish County in defending its action was Intervenor Dwayne Lane, the owner of property within the Island Crossing area.

The Board agrees with the Petitioners that Snohomish County Ordinance No. 03-063 **does not comply** with the goals and requirements of the GMA, specifically its provisions regarding conservation of agricultural resource lands and the provisions regarding the expansion of urban growth areas. Because the Board finds these two independent reasons for remanding Ordinance No. 03-063 to the County, it concludes that it need not reach the question of whether the County's action also violated the GMA's provisions regarding protection of critical areas.

The Board directs Snohomish County to take legislative action to bring Ordinance No. 03-063 into compliance with the goals and requirements of the GMA by **May 24, 2004**. The Board further finds that the continued validity of Ordinance No. 03-063 during the period of remand would substantially interfere with fulfillment with the goals of the Act regarding conservation of agricultural land, directing development to urban areas and reducing sprawl. Therefore, the Board enters a **Determination of Invalidity** with respect to the following portions of Ordinance No. 03-063:

- The portion that expanded the Arlington urban growth area by 110.5 acres to include the Island Crossing area.
- The portion that replaced the 75.5 acre area of Riverway Commercial Farmland designation with an Urban Commercial designation
- The portion that rezoned the 75.5 acres of A-10 to General Commercial (GC)
- The portion that replaced the 35.5 acre area of Rural Freeway Service with an Urban Commercial designation
- The portion that rezoned the 35.5 acres of Rural Freeway Service (RFS) to General Commercial

The Board notes that Section 6 Ordinance 03-063 explicitly provides that "if any provision of this ordinance is held invalid or unconstitutional, then the provision in effect prior to the effective date of this ordinance shall be in full force and effect for that individual provision as if this ordinance had never been adopted."

II. BACKGROUND

A. HISTORY OF GMA LITIGATION RE: ISLAND CROSSING

1. Among the seventy issues challenging the GMA compliance of Snohomish County's first comprehensive plan in 1996 was an allegation by Pilchuck Audubon Society that the County had violated the agricultural resource lands provisions of the Growth

Management Act in removing from resource lands designation lands in the Island Crossing Area. The Board upheld the County's action. CPSGMHB, *Sky Valley, et al., v. Snohomish County*, Final Decision and Order, Case No. 96-3-0068c, April 15, 1996.

2. On November 19, 1997, Snohomish County Superior Court, in reviewing the Board's decision in *Sky Valley v. Snohomish County,* issued a "Judgment Affirming in Part and Remanding in Part," Superior Court Case No. 96-2-03675-5.

3. In an oral decision incorporated by the Court into the Judgment Affirming in Part and Remanding in Part, the Superior Court stated:

> Evidence and arguments supporting de-designation were presented by [the City of Arlington] . . . focused almost exclusively on issues relating to the City of Arlington's economic growth and well-being, and not on Growth Management Act Criteria. . . .An isolated special purpose freeway service node does not constitute generalized urban growth . . . What happened to the fundamental axiom of the Growth Management Act that "the land speaks first"? Where does the Act state that the economic welfare of cities speaks first? Where does the evidence submitted by Arlington even reference the agricultural productivity or the floodplain status of the lands which are not proposed for automobile dealerships? Freeways are no longer longtitudinal strips of urban opportunity. Agricultural lands must be conserved as a first priority, and urban centers must be compact, separate and distinct features of the remaining part of the landscape.

Id. Transcript of Proceedings, Court's Oral Ruling, at 14-18.

4. The Superior Court remanded the *Sky Valley* matter to the Board, finding no substantial evidence to support the removal of the agricultural designation. PDS Report, at 4.

5. Subsequent to the Superior Court remand, the Snohomish County Planning Commission and County Council reconsidered the land use designations for Island Crossing in 1998 and redesignated the agricultural areas as agricultural and redesignated the commercial area as Rural Freeway Service, and removed Island Crossing from the Arlington UGA.
Id.

6. Dwayne Lane, the owner of 15 acres of land bordering Interstate 5 in Island Crossing, challenged the County's designation of Island Crossing as agricultural resource land and filed a petition for review with the Growth Management Hearings Board. The Board rejected Lane's appeal. CPSGMHB Case No. 98-3-0033c, *Lane, et al., v. Snohomish County*, Order Granting Motion to Dismiss [Lane]. Jan. 20, 1999.

7. Snohomish County Superior Court affirmed the Board's January 20, 1999 Order, after which Lane appealed to the Court of Appeals. *Lane v. Central Puget Sound Growth Management Hearings Board*, 2001 WL 244384 (Wash. App. Div. I, Mar. 12, 2001).

8. The Court of Appeals described the Island Crossing area as follows:

> Island Crossing is composed of prime agricultural soils and has been described as having agricultural value of primary significance. Except for the County's 1995 dedesignation of Island Crossing as agricultural land, Island Crossing has been designated and zoned agricultural since 1978. Thus, the record supports a finding that Island Crossing is capable of being used for agricultural production. *See City of Redmond v. Cent. Puget Sound Growth Mgmt. Hrgs. Bd.*, 136 Wn.2d 38, 53, 959 P.2d 1091 (1998).
>
> Although Island Crossing borders the interchange of Interstate 5 and State Road 530, it is separated from Arlington by farmland. Indeed, the record contains evidence to indicate that most of the land in Island Crossing is being actively farmed, except a small area devote to freeway services. Thus, the record indicates that the land is actually used for agricultural production. *See City of Redmond*, 136 Wn.2d at 53. The only urban development permits issued for Island Crossing are for the area that serves the freeway. Further, the substantial shoreline development permit for sewer service in the freeway area explicitly 'prohibits any service tie-ins outside the Freeway Service Area.' Thus, adequate public facilities and services do not currently exist.
>
> *Id.*

B. PROCEDURAL HISTORY OF CASE NO. 03-3-0019c

On October 23, 2003, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from 1000 Friends of Washington, Stillaguamish Flood Control District (**Stillaguamish**), Agriculture for Tomorrow, and Pilchuck Audubon Society (collectively, **Petitioners** or **1000 Friends**) and "Request for Expedited Review." Petitioners challenge the adoption by Snohomish County (the **County** or **Snohomish**) of Amended Ordinance No. 03-063.

The basis for the challenge is alleged noncompliance with various provisions of the Growth Management Act (**GMA or Act**). The matter was assigned Case No. 03-3-0019 and is hereafter referred to as *1000 Friends, et al., v. Snohomish County.* Board member Joseph W. Tovar is the Presiding Officer for this matter.

On October 28, 2003, the Board issued the "Notice of Hearing" in this matter.

On November 5, 2003, the Board received "Snohomish County's Response to Petitioners' Request for Expedited Review." Also on this date, the Board received from Dwayne Lane a "Motion for Status as Intervenor" (the **Dwayne Lane Motion to Intervene**) in Case No. 03-3-0019 and a draft "Order Granting Motion for Status as Intervenor." Also on this date, the Board received a PFR from "The Director of the State of Washington Department of Community, Trade, and Economic Development" (the **DCTED II PFR**) challenging the adoption of Snohomish County Ordinances Nos. 03-063 and 03-104, together with a "Motion to Consolidate" (the **DCTED Motion to Consolidate**) with Cases Nos. 03-3-0017 and 03-3-0019. The DCTED II PFR case was assigned Case No. 03-3-0020 and the case was titled *CTED v. Snohomish County [II]*.

On November 6, 2003, beginning at 10:00 a.m., the Board conducted the prehearing conference in the training room on the 24th floor of the Bank of California Building, 900 Fourth Avenue in Seattle. At the prehearing conference, the presiding officer orally granted the portion of the DCTED Motion to Consolidate that includes issues addressed to Snohomish Ordinance No. 03-063. He indicated that the legal issues addressed to Snohomish Ordinance No. 104 would not be consolidated with Case No. 03-3-0019, but would be referred to Mr. McGuire, the presiding officer in Case No. 03-3-0017. The presiding officer also orally granted the motion by Dwayne Lane to intervene in the consolidated 1000 Friends and DCTED challenges to Snohomish Ordinance No. 03-063.

On November 10, 2003, the Board received "Snohomish County-Camano Association of Realtors and Master Builders Association of King and Snohomish Counties' Joint Opposition to CTED's Motion to Consolidate." The caption of this pleading listed both Case No. 03-3-0017 (CTED I) and Case No. 03-3-0020 (CTED II).

On November 12, 2003, the Central Puget Sound Growth Management Hearings Board (the **Board**) issued "Prehearing Order, Order Partially Granting Motion for Consolidation, and Order Granting Motion for Intervention" (the **PHO**) in the above captioned matter. The PHO set the Final Schedule for the submittal of motions and briefs. PHO, at 4-5. Later on this same date, the Board received from Petitioner 1000 Friends a letter (the **1000 Friends letter**) attached to which were: (1) a City of Arlington Development Services "City Council Agenda Bill" with a Council Meeting Date of September 17, 2003 and the subject heading caption "Consideration of Intention of Annexation 10% Petition for Island Crossing Annexation (File No. A-03-068)" and (2) a memorandum, dated September 7, 2003, from Cliff Strong, Arlington Planning Manager to the Mayor and City Council.

On November 13, 2003, the Board received from the County a letter (the **County letter**) responding to the 1000 Friends letter.

On November 14, 2003, the Board received "Snohomish County's Index to the Record" (the **County's Index**). Later on this same date, the presiding officer directed Susannah Karlsson, the Board's Administrative Officer, to contact the parties to the case for the purpose of setting up a telephone conference call to hear oral argument regarding the

1000 Friends letter and the County letter on Tuesday, November 18, 2003 commencing at 9 a.m.

On November 18, 2003, the Board conducted a telephonic conference call to hear argument regarding the 1000 Friends letter and the County letter. Participating for the Board were Bruce C. Laing and Joseph W. Tovar, presiding officer. Participating for 1000 Friends was John T. Zilavy, for the County was Andrew S. Lane, for Stillaguamish were Henry Lippek and Ashley E. Evans, for Intervenor Dwayne Lane was Todd C. Nichols, and for the Washington State Department of Community, Trade and Economic Development was Alan D. Copsey.

On November 24, 2003, the Board issued "Order Granting Motion to Supplement the Record" (the **First Order on Motions**). The First Order Granting Supplementation admitted to the record before the Board two supplemental exhibits and assigned them exhibit numbers Supp. Ex. 1 and Supp. Ex. 2.

On December 4, 2003, the Board received "1000 Friends' Motion to Correct the Record and Index of Record" (the **1000 Friends Motion**) with proposed supplemental exhibits A, B, and C.

On December 5, 2003, the Board received "Flood Control District's Motion to Correct the Record and Index of the Record," (the **Stillaguamish Motion**) with proposed supplemental exhibits A and B.

On December 12, 2003, the Board received "Snohomish County's Response to Motions to Supplement the Record" (the **County Response**) with Attachments A, B and C. On this same date the Board received "Dwayne Lane's Memorandum in Opposition to Correct the Record and Index of Record" (the **Lane Memorandum**) together with the "Declaration of Dwayne Lane Re: Motions to Correct or Supplement the Record" (the **Lane Declaration**).

On December 18, 2003, the Board received "Petitioners' Reply to Motion to Correct the Record and Index of Record" (the **1000 Friends Reply**).

On December 19, 2003, the Board received "Flood District's Reply to Dwayne Lane and Snohomish County's Responses to Motion to Correct the Record and Index of Record" (the **Flood District Reply**).

On January 2, 2004, the Board issued "Second Order on Motions" (the **Second Order on Motions**).

On January 9, 2004, the Board received the "Petitioner Stillaguamish Flood Control District's Prehearing Brief" (the **Flood District PHB**) "1000 Friends of Washington Opening Brief" (the **1000 Friends' Opening Brief**); and "CTED's Opening Brief" (the **CTED Opening Brief**).

On January 23, 2004, the Board received "Snohomish County's Response Brief" (the **County Response**) and "Intervenor Lane's Hearing Response Memorandum" (the **Lane Response**) and "Intervenor Lane's Motion to Supplement the Record" (the **Lane January 23, 2004 Motion to Supplement**).

On January 29, 2004, the Board received "Flood District's Reply Brief" (the **Flood District Reply**), and "CTED's Reply Brief" (the **CTED Reply**).

On January 30, 2004, the Board received "1000 Friends of Washington, Agriculture for Tomorrow, and Pilchuck Audubon Society Reply Brief" (the **1000 Friends Reply**).

The Board conducted the Hearing on the Merits (the **HOM**) in this matter on February 2, 2004 in the conference room adjacent to the Board's office, Suite 2470, 900 Fourth Avenue in Seattle. Present for the Board were Edward G. McGuire, Bruce C. Laing, and Joseph W. Tovar, presiding officer. Also present were the Board's legal externs Ketil Freeman and Lara Heisler. Court reporting services were provided by Scott Kindle of Mills and Lessard, Seattle. The parties were represented as follows: for 1000 Friends was John T. Zilavy; for Stillaguamish Flood Control District were Henry Lippek and Ashley Evans; for CTED was Alan D. Copsey; for the County was Andrew S. Lane; and for Intervenor Dwayne Lane was Todd C. Nichols. No witnesses testified. At the conclusion of the HOM, the presiding officer directed that a transcript (the **HOM Transcript**) be prepared.

On February 11, 2004, the Board received a letter from counsel for the County indicating that "Snohomish County will not be submitting a post-hearing rebuttal to 1000 Friends' late reply brief."

On February 13, 2004, the Board received "Intervenor Lane's Surrebuttal Memorandum" (the **Lane Surrebuttal**).

On March 18, 2004, the Board received "1000 Friends of Washington, Agriculture for Tomorrow, and Pilchuck Audubon Society Motion to Supplement the Record" (the **1000 Friends March 18, 2004 Motion to Supplement**). Later on this same date, the Board received "Respondent Snohomish County's Response to 1000 Friends' Motion to Supplement the Record" (the **County Response to the 1000 Friends March 18, 2004 Motion to Supplement**).

On March 19, 2004, the presiding officer directed the Board's Administrative Officer Susannah Karlsson to contact the parties to ask if they wished to file any response to the 1000 Friends March 18, 2004 Motion to Supplement. She made telephone contact with all parties. Later on this same date, the Board received "Intervenor Dwayne Lane's Response to 1000 Friends' Motion to Supplement the Record" (the **Lane Response to the 1000 Friends March 18, 2004 Motion to Supplement**) and correspondence from counsel for the Stillaguamish Flood Control District (the **Flood District Letter**).

III. FINDINGS OF FACT

1. The Snohomish County Council adopted Ordinance No. 03-063 on September 10, 2003. 1000 Friends PFR, Attachment 1.

2. The caption of Ordinance No. 03-063 reads: "REVISING THE EXISTING URBAN GROWTH AREA FOR THE CITY OF ARLINGTON; ADOPTING MAP AMENDMENTS TO THE GROWTH MANAGEMENT ACT COMPREHENSIVE PLAN; AND ADOPTING COUNTY-INITIATED AREA-WIDE REZONES PURSUANT TO CHAPTER 30.74 SCC; AND AMENDING AMENDED ORDINANCE 94-125, ORDINANCE 94-120, AND EMERGENCY ORDINANCE 01-047. *Id.*

3. Among the County Council's findings of fact and conclusions listed in Section 1 of Ordinance No. 03-063 are the following:

> B. 6. Ragnar soils are the best soils for production of commercial crops and there are no Ragnar soils at Island Crossing. The Island Crossing area consists primarily of Puget soils that are adequate for hay, green chop and pasture, but are not suitable for more valuable crops like berries and corn. The Puget soils are considered "prime" only when artificially drained, which the land at the site is not, and even when drained the Puget series is considered low productivity.
>
> B.7. Farming is no longer financially viable at Island Crossing. Busy highways, high assessed value, small parcel size and safety issues eliminate the viability of the Island Crossing interchange site as agricultural land.
>
> B.8. Snohomish County is growing rapidly and it is inevitable that sits like Island Crossing will be converted from agricultural uses to commercial uses.
>
> S. Approval of the Island Crossing Interchange Docket Proposal is not precedent for redesignation of Agricultural land in the Stillaguamish Valley. This proposal is approved entirely on its own merits. These include: (1) This proposal is supported by the Snohomish County Planning Commission. (2) Bringing this land into the Arlington Urban Growth Area is fully supported by the City of Arlington. (3) This proposal is supported by the Stillaguamish Tribe. (4) This land is located at an I-5 interchange between an interstate highway and a state highway, and is uniquely located for commercial needs of the area. (5) This land has unique access to utilities. Redesignation of adjacent properties to the east will not occur because utilities are unavailable to the east.

T. The land contained within the Island Crossing Interchange Docket Proposal is not agricultural land of long term commercial significance. . . At the public hearing, the testimony of Mrs. Robert Winter (Exh. 111) was very persuasive on this point. Since the mid-1950's, she and her husband had a dairy farm in the very location of the Island Crossing Interchange Docket Proposal site. Locating and then expanding I-5 put them out of the dairy business. They soon discovered that crops generated less revenue than the property taxes. The Winters sold the land because the land could not be profitably farmed.

U. The Island Crossing Interchange Docket Proposal site has episodically flooded in the past and will continue to episodically flood in the future, whether or not the proposal is approved, and whether or not the site is developed. The relevant question is not whether the proposal site experiences floods, but rather does the site experience significant adverse flood impacts which cannot be reasonably mitigated. The Draft Supplemental Environmental Impact Statement (Exh. 22) clearly states, at p. 2-24: "Assuming effective implementation of applicable regulations and recommended mitigation measures, no significant unavoidable adverse surface water quantity or quality impacts would be anticipated associated with the future development of the site." *Id.*

4. Section 6 of Ordinance No. 03-063 provides:

> Severability. If any provision of this ordinance is held invalid or unconstitutional, such invalidity or unconstitutionality shall not affect the validity or constitutionality of the remainder of this ordinance. Provided, however, that if any provision of this ordinance is held invalid or unconstitutional, then the provision in effect prior to the effective date of this ordinance shall be in full force and effect for that individual provision as if this ordinance had never been adopted.

Id.

5. Snohomish County is 2,089 square miles. Washington State Data Book for 2003, Office of Financial Management, at 236.

6. The Snohomish County General Policy Plan designates approximately 3% of the County's total land area, or 60,000 acres, as GMA agricultural resource lands. http://www.co.snohomish.wa.us/PDS/900-Planning/Resource/default.asp

7. With the exception of the cities of Stanwood and Arlington, the floodplain of the main fork of the Stillaguamish River is designated on the County's Future Land Use Map as Agricultural Resource Land. Snohomish County General Policy Plan, FLUM, online at http://www.co.snohomish.wa.us/pds/905-GIS/maps/flu/flu117.pdf.

8. The Island Crossing area is located within the floodplain of the Stillaguamish River. Planning and Development Services (**PDS**) Report, at 10.

9. The Stillaguamish River basin suffers from damaging floods on average every three to five years according to the Federal Emergency Management Agency. PDS Report, at 11.

10. The 110.5 acre area subject to Ordinance No. 03-063 is configured as a multi-sided polygon with two roughly mile-long sides that follow north-south right-of-way lines, two smaller but *parallel* east-west sides that do not follow right-of-way lines, and a number of other smaller sides that follow jogs in right-of-way or property lines. DEIS, Figure 1-2, scale map of "Proposed Comprehensive Plan Amendment – Dwayne Lane."

11. The two long sides of the 110.5 acre shape are (a) the western side which coincides with the western edge of the Interstate 5 right-of way for approximately 5,900 linear feet; and (b) the eastern side of approximately 5,000 linear feet, of which roughly the southerly 4,300 feet coincide with the eastern edge of the Smokey Point Boulevard right-of-way. The two parallel sides of this shape are (a) the northerly edge which is approximately 2,700 linear feet and coincides with the northern edge of parcels which front onto S.R. 530; and (b) the southern side, which is roughly 450 linear feet long, and lies entirely within public right-of-way. *Id.*

12. The southerly 700 feet of the 110.5 acre shape (*i.e.*, that portion which lies south of 200th Street NE, if extended) is entirely within either Interstate 5 right-of-way or Smokey Point Boulevard right-of-way. *Id.*

13. The City of Arlington city limits abut the southern edge of the 110.5 acre shape.

14. The closest point of contact between Arlington's city limits and private property within the 110.5 acre shape is approximately 700 feet. *Id.*

15. Prior to the adoption of Ordinance No. 03-063, the 35.5 acre northwest portion of the 110.5 acre area was designated on the County's Future Land Use Map (**FLUM**) as Rural Freeway Service and zoned Rural Freeway Service (RFS). DSEIS, at i.

16. Prior to the adoption of Ordinance No. 03-063, the 75.5 acre eastern portion of the 110.5 acre area was designated on the FLUM as Riverway Commercial Farmland and zoned Agricultural-10. *Id.*

17. The Island Crossing Area is designated floodway fringe by the County's flood hazard regulations. PDS Report, at 14.

18. In letters dated February 21, 2003 and February 26, 2003, the Snohomish County Agricultural Advisory Board recommended that the County not remove the agricultural land use designations at Island Crossing. Index of Record 25.

19. The Agricultural Advisory Board stated its reasoning as:

    1) The land lies in the Stillaguamish floodplain, at or below the 100-year flood level. Photographs demonstrate it is completely inundated

during major flood events, much of it under several feet of water. It is bisected by a floodway (South Slough) and bordered by a 303d-listed, year-round salmon stream (Portage creek), into which the area drains.

2) The land is comprised of prime agricultural soil, well drained and highly fertile. Currently and historically farmed, it has long been identified by the County as "agricultural land of primary importance."

3) All adjacent lands, except a small, freeway service zone, are predominantly agricultural in use and indisputably non-urban in character. The existing "development pattern," cited as a hindrance to farming in the request itself, would be dwarfed by the one it proposes, with proportionate adverse impact.

Id.

IV. STANDARD OF REVIEW/BURDEN OF PROOF/DEFERENCE

A. Board Review of Local Government Decisions

Petitioners challenge the County's adoption of Ordinance No. 03-063 alleging that the Ordinance does not comply with the goals and requirements of the Growth Management Act. Pursuant to RCW 36.70A.320(1), Ordinance No. 03-063, is presumed valid upon adoption by the County. Petitioners bear the **burden of proof** of overcoming the County's **presumption of validity** by presenting evidence and argument that demonstrates clear error.

The Board is directed by RCW 36.70A.320(3) to review the challenged action using the **"clearly erroneous" standard of review**. The Board "shall find compliance unless it determines that the actions taken by [a city or county] are clearly erroneous in view of the entire record before the board and in light of the goals and requirements of [the GMA]." For the Board to find the County's actions clearly erroneous, the Board must be "left with the firm and definite conviction that a mistake has been made." *Dep't of Ecology v. PUD 1*, 121 Wn.2d 179, 201 (1993).

Pursuant to RCW 36.70A.3201, the Board will grant **deference** to the County in how it plans for growth, provided that its policy choices are consistent with the goals and requirements of the GMA. In 2000, the State Supreme Court reviewed RCW 36.70A.3201 and clarified that, "Local discretion is bounded . . . by the goals and requirements of the GMA." *King County v. Central Puget Sound Growth Management Hearing Board* (***King County***), 142 Wn.2d 543, 561, 14 P.3d 133, 142 (2000).

In 2001, Division II of the Court of Appeals further clarified, "Consistent with *King County*, and notwithstanding the 'deference' language of RCW 36.70A.3201, the Board acts properly when it foregoes deference to a . . . plan that is not 'consistent with the requirements and goals of the GMA." *Cooper Point Association v. Thurston County* ***(Cooper Point)***, No. 26425-1-II, 108 Wn. App. 429, 31 P.3d 28 (Wn.App. Div. II, 2001).

In 2002, the Supreme Court upheld the *Cooper Point* court. *Thurston County v. Western Washington Growth Management Hearing Board,* Docket No. 71746-0, November 21, 2002, at 7.

B. Judicial Review of Board Decisions

Any party aggrieved by a final decision by a growth management hearings board may appeal the decision to superior court as provided in RCW 34.05.514 or 36.01.050 within thirty days of the final order of the Board. RCW 36.70A.300(5).

RCW 36.70A.260(1) requires that board members be "qualified by experience or training in matters pertaining to land use planning." The Board has been endowed by the legislature with quasi-judicial functions due to its expertise in land use planning.[2] Accordingly, under the Administrative Procedures Act, a reviewing court accords substantial weight to this agency's interpretation of the law. The Supreme Court, in *Cooper Point*, specifically affirmed this standard of review of a Growth Management Hearings Board decision:

> Although we review questions of law *de novo*, we give substantial weight to the Board's interpretation of the statute it administers. *See Redmond*, 136 Wn.2d at 46. Indeed "[I]t is well settled that deference [to the Board] is appropriate where an administrative agency's construction of statutes is within the agency's field of expertise . . .

Id.

V. MISCELLANEOUS MOTIONS

A. MOTION TO STRIKE PORTION OF FLOOD DISTRICT BRIEF

At the hearing on the merits, the presiding officer orally granted the County Motion to Strike a portion of the Flood District PHB. Transcript, at 5-7. The County Motion to Strike a Portion of the Flood District Brief is **granted**. The Board will not consider the portions of the Flood District PHB from line 18 on page 24 through line 5 on page 27.

B. MOTION TO STRIKE 1000 FRIENDS REPLY BRIEF

At the hearing on the merits, the presiding officer orally denied the Motion to Strike 1000 Friends Reply Brief; however, he provided the County and Intervenor with an opportunity to file a post-hearing brief responsive to the 1000 Friends Reply Brief. Transcript, at 8-15. The Motion to Strike 1000 Friends Reply Brief is **denied.**

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[2] The Board members possess the expertise required by RCW 36.70A.260(1). Vitae for Central Puget Sound Board members are posted on the Board's website at www.gmhb.wa.gov/central/index.html.

C. LANE JANUARY 23, 2004 MOTION TO SUPPLEMENT

In the Second Order on Motions, which admitted certain supplemental exhibits by Petitioners, the Board stated that Intervenor lane would be allowed to submit rebuttal evidence. Second Order on Motions, at 9. Attached to Intervenor Lane's January 23, 2004 Motion to Supplement the Record were three proposed supplemental exhibits: "A" which consists of a series of date and time stamped photographs of Island Crossing properties showing its status throughout the day of October 21, 2004; Exhibit B which is a map labeled "Island Crossing Annexation Exhibit" which identifies the location and direction of a photo which is attached as proposed Exhibit C. Petitioner Lane presents argument addressed to the criteria governing the admission of supplemental evidence. Intervenor Lane Motion to Supplement the Record, at 2.

The Board finds that proposed supplemental exhibits "A," "B," and "C' may be of assistance in reaching a decision regarding aspects of the present matter, therefore Intervenor's proposed exhibits are **admitted** as Supplemental Exhibits 5, 6, and 7, respectively.

D. 1000 FRIENDS MARCH 18, 2004 MOTION TO SUPPLEMENT

The 1000 Friends March 18, 2004 Motion to Supplement the record before the Board asks the Board to admit two proposed exhibits. The first is a letter dated March 4, 2004 from the Clerk of the Washington State Boundary Review Board for Snohomish County, the second is an agenda for a City of Arlington special meeting on March 23, 2004. The March 19, 2004 letter from counsel for the Flood Control District supports the 1000 Friends Motion.

Respondent Snohomish County objects to the motion to supplement with these two proposed exhibits. The County argues "Petitioner's motion should be denied outright, because petitioner has failed to follow the Board's rules. 'No written motion may be filed after the date specified in the [prehearing] order without written permission of the board or presiding officer.'" County Response to the 1000 Friends March 18, 2004 Motion to Supplement, at 2, quoting WAC 242-02-532(2). The County also argues that the proposed supplemental evidence will not be of substantial assistance to the Board and points out that Petitioner made no attempt to relate these items to any issue before the Board. *Id.*, at 3. Intervenor Lane agrees with the County's arguments. Lane Response to the 1000 Friends March 18, 2004 Motion to Supplement, at 1.

The Board agrees with the County and Intervenor that Petitioner 1000 Friends failed to comply with the provisions of the Board's Rules and the Prehearing Order by submitting a Motion to Supplement without first submitting a written request for leave to file such pleading. Pursuant to the provisions of WAC 242-02-532(2), the 1000 Friends March 18, 2004 Motion to Supplement is **denied.**

VI. BOARD JURISDICTION AND PREFATORY NOTE

A. BOARD JURISDICTION

The Board finds that Petitioners' PFRs were timely filed, pursuant to RCW 36.70A.290(2); all three Petitioners have standing to appear before the Board, pursuant to RCW 36.70A.280(2); and the Board has subject matter jurisdiction over the challenged Ordinance, pursuant to RCW 36.70A.280(1)(a).

B. PREFATORY NOTE

The Board has organized its discussion and analysis of the five legal issues as follows: first, the Board addresses the allegations regarding the County's redesignation of agricultural resource lands (Legal Issue No. 2); then allegations regarding expansion of the Urban Growth Area (Legal Issues Nos. 1 and 4); then allegations regarding Critical Areas (Legal Issue No. 5). Although the parties briefed the question of invalidity as a legal issue (Legal Issue No. 3), it is addressed in Section VIII titled "Invalidity."

VII. LEGAL ISSUES

A. REDESIGNATION OF AGRICULTURAL RESOURCE LAND

Legal Issue No. 2

Does the Snohomish County adoption of Amended Ordinance No. 03-063, redesignating 110.5 acres from Riverway Commercial Farmland and Rural Freeway Service to Urban Commercial, fail to comply with RCW 36.70A.020(2) and (8) (planning goals to reduce sprawl and conserve natural resource lands), RCW 36.70A.040 (local governments must adopt development regulations that preserve agricultural lands), RCW 36.70A.050 (classification of agricultural lands), and RCW 36.70A.060 (conservation of agricultural lands), and RCW 36.70A.170 (designation of agricultural lands) when this redesignation lacks justification in the record and fails to enhance, protect or conserve agricultural lands of long term commercial significance as required by the Growth Management Act?

1. Applicable Law

A. Statutory Provisions

RCW 36.70A.020 provides in relevant part:

> The following goals are adopted to guide the development and adoption of comprehensive plans and development regulations of those counties and cities that are required or choose to plan under RCW 36.70A.040. The following goals are not listed in order of priority and shall be used exclusively for the purpose of guiding the development of comprehensive plans and development regulations:

(2) Reduce sprawl. Reduce the inappropriate conversion of undeveloped land into sprawling, low-density development.

. . . .

(8) Natural resource industries. Maintain and enhance natural resource-based industries, including productive timber, agricultural, and fisheries industries. Encourage the conservation of productive forest lands and productive agricultural lands, and discourage incompatible uses.

RCW 36.70A.040 provides in relevant part:

(1) Each county that has both a population of fifty thousand or more . . . shall conform with all of the requirements of this chapter.

. . . .

(3) Any county or city that is initially required to conform with all of the requirements of this chapter under subsection (1) of this section shall take actions under this chapter as follows: (a) The county legislative authority shall adopt a county-wide planning policy under RCW 36.70A.210; (b) the county and each city located within the county shall designate critical areas, agricultural lands, forest lands, and mineral resource lands, and adopt development regulations conserving these designated agricultural lands, forest lands, and mineral resource lands and protecting these designated critical areas, under RCW 36.70A.170 and 36.70A.060; (c) the county shall designate and take other actions related to urban growth areas under RCW 36.70A.110; (d) if the county has a population of fifty thousand or more, the county and each city located within the county shall adopt a comprehensive plan under this chapter and development regulations that are consistent with and implement the comprehensive plan on or before July 1, 1994, . . .

Emphasis added.

RCW 36.70A.050 provides in relevant part:

(1) Subject to the definitions provided in RCW 36.70A.030, the department shall adopt guidelines, under chapter 34.05 RCW, no later than September 1, 1990, to guide the classification of: (a) Agricultural lands; (b) forest lands; (c) mineral resource lands; and (d) critical areas. The department shall consult with the department of agriculture regarding guidelines for agricultural lands, the department of natural resources regarding forest lands and mineral resource lands, and the department of ecology regarding critical areas.

. . . .

(3) The guidelines under subsection (1) of this section shall be minimum guidelines that apply to all jurisdictions, but also shall allow for regional differences that exist in Washington state. The intent of these guidelines is

to assist counties and cities in designating the classification of agricultural lands, forest lands, mineral resource lands, and critical areas under RCW 36.70A.170.

Emphasis added.

RCW 36.70A.060 provides in relevant part:

> (1) Each county that is required or chooses to plan under RCW 36.70A.040, and each city within such county, shall adopt development regulations on or before September 1, 1991, to assure the conservation of agricultural, forest, and mineral resource lands designated under RCW 36.70A.170. . . .

Emphasis added.

RCW 36.70A.170 provides in relevant part:

> (1) On or before September 1, 1991, each county, and each city, shall designate where appropriate:
>
> (a) Agricultural lands that are not already characterized by urban growth and that have long-term significance for commercial production of food or other agricultural products;

Emphasis added.

"Long term commercial significance" is defined as "the growing capacity, productivity, and soil composition of the land for long-term commercial production, in consideration with the land's proximity to population areas, and the possibility of more intense uses of the land." RCW 36.70A.030(10).

B. WAC 365-190-050

The Department of Community, Trade, and Economic Development was directed by RCW 36.70A.050 to adopt guidelines to guide the classification of agricultural lands. These provide:

> (1) In classifying agricultural lands of long-term significance for the production of food or other agricultural products, counties and cities shall use the land-capability classification system of the United States Department of Agriculture Soil Conservation Service [**SCS**] as defined in Agricultural Handbook No. 210. These eight classes are incorporated by the United States Department of Agriculture [**USDA**] into map units described in published soil surveys. These categories incorporate consideration of the growing capacity, productivity and soil composition of the land. Counties and cities shall also consider

the combined effects of proximity to population areas and the possibility of more intense uses of the land as indicated by:

a. The availability of public facilities;
b. Tax status;
c. The availability of public services;
d. Relationship or proximity to urban growth areas;
e. Predominant parcel size;
f. Land use settlement patterns and their compatibility with agricultural practices;
g. Intensity of nearby land uses;
h. History of land development permits issued nearby;
i. Land values under alternative uses; and
j. Proximity to markets.

(2) In defining categories of agricultural lands of long-term commercial significance for agricultural production, counties and cities should consider using the classification of prime and unique farmland soils as mapped by the Soil Conservation Service. If a county or city chooses to not use these categories, the rationale for that decision must be included in its next annual report to the department of community development.

WAC 365-190-050.

C. WASHINGTON SUPREME COURT CASE LAW

In a 1998 case, *Redmond v. Central Puget Sound Growth Management Hearings Board* (***Redmond***), 136 Wash. 2d 38 (1998), at 53, the State Supreme Court construed the statutory term "devoted to agricultural use": "We hold land is 'devoted to' agricultural use under RCW 36.70A.030 if it is an area where the *land is actually used or capable of being used* for agricultural production." (Emphasis supplied.) The Court also stated, at 53:

> [I]f land owner intent were the controlling factor, local jurisdictions would be powerless to preserve natural resource lands. Presumably in the case of agricultural land, it will always be financially more lucrative to develop such land for uses more intense than agriculture. Although some owners of agricultural land may wish to preserve it as such for personal reasons, most, . . .will seek to develop their land to maximize their return. If the designation of such land as agriculture depends on the intent of the landowner as to how he or she wishes to use it, the GMA is powerless to prevent the loss of natural resource land. All a land speculator would have to do is buy agricultural land, take it out of production, and ask the controlling jurisdiction to amend its comprehensive plan to remove the "agricultural land" designation

> . . . One cannot credibly maintain that interpreting the definition of "agricultural land" in a way that allows the land owners to control its designation gives effect to the Legislature's intent to maintain, enhance, and conserve such land . . . We decline to interpret the GMA definition in a away that vitiates the stated intent of the statute.

In 2000, the Supreme Court further clarified that the GMA "evidences a legislative mandate for the conservation of agricultural land . . . " in *King County v. Central Puget Sound Growth Management Hearings Board* ***[King County]***, 142 Wn.2d 543, 558, 14 P.3d 133 (2000). The Court also stated:

> In summary, the agricultural lands provisions (RCW 36.70A.020(8), .060, and .170) direct counties and cities (1) to designate agricultural lands of long-term commercial significance; (2) to assure the conservation of agricultural land; (3) to assure that the use of adjacent lands does not interfere with their continued use for agricultural purposes; (4) to conserve agricultural land in order to maintain and enhance the agricultural industry; and (5) to discourage incompatible uses...
>
> Although the planning goals are not listed in any priority order in the Act, the verbs of the agricultural provisions mandate specific, direct action. The County has a duty to designate and conserve agricultural lands to assure the maintenance and enhancement of the agricultural lands to assure the maintenance and enhancement of the agricultural industry.

2. Discussion

Positions of the Parties

1. Petitioners

Petitioners contend that the County's redesignation of 110.5 acres of land from Riverway Commercial Farmland and Rural Freeway Service to Urban Commercial lacks

justification in the record and fails to protect agricultural lands of long-term commercial significance.

1000 Friends asserts that the issues raised in *1000 Friends of Washington v. Snohomish County*, CPSGMHB Case No. 03-3-00019c, relating to the redesignation of agricultural land are substantially similar to those issues already addressed by the Board in *Hensley VI*. In that case, the Board determined that Snohomish County's action was clearly erroneous when it concluded that land in question no longer met the criteria for designation as agricultural land of long-term commercial significance.

1000 Friends argues that Mrs. Roberta Winter's testimony did not provide a basis for the County to de-designate the resource land at Island Crossing. 1000 Friends' Opening Brief, at 23. At the public hearing, Mrs. Winter opined that the land was not good crop land. Partial Transcript Snohomish County Ag Board Meeting 02/06/03, at 3-4. She stated that she and her husband operated a dairy farm in the very location of the Island Crossing Interchange Docket Proposal site. *Id.* 1000 Friends states that it is apparent from the transcript that the Winters were dairy farmers, and it is unclear if they ever attempted to raise crops on their land. *Id.* 1000 Friends further points out that Ms. Winter's testimony was contradicted by statements of farmers on the Snohomish County Agricultural Advisory Committee who said they could farm Mr. Lane's land today. 1000 Friends Opening Brief, at 23.

1000 Friends provides supporting evidence that Island Crossing is being used in support of agricultural production by the pea farmers in the Stillaguamish valley. They point to record evidence from a local pea processing company stating that this land can be farmed for commercial agricultural crops. *Index of Record No. 101, Letter from Roger O. Lervick, Twin City Foods, Inc. July 9, 2003*. That testimony provides:

> [w]e currently contract with local growers in the Stillaguamish and Skagit valleys to raise peas for our plant in Stanwood. We have raised anywhere from 5000 acres to 10,000 acres of peas in this local area and we currently contract a portion of those acres in the Island Crossing area and have found it ideal for raising peas.

Id., at 23.

1000 Friends points out that the County's PDS conducted an analysis of the Dwayne Lane proposal. Index of Record No.21. The PDS Report recommended that the County deny Dwayne Lane's requested redesignation and rezone. Index of Record No. 21, PDS Report, at 2-3 and 14.

In addition, the PDS Report states:

> Discussion: Analysis of the proposal conducted by PDS conclude that under the GMA's minimum guidelines for classification of agricultural lands, the portion of the proposal site currently designated and zoned for

agricultural uses should continue to be classified as such. This conclusion is based on the following analysis of the GMA guidelines:

Availability of Public Facilities: Public water and sanitary sewer facilities are physically located in and adjacent to the proposal site. However, sanitary sewer service is restricted by the GPP to Urban Growth Area. The shoreline substantial development permit for the existing sewer line restricts availability of sanitary sewer to the existing parcels zoned Rural Free Way Service.

Tax Status: Several large parcels in the area (approximately 32%of the area) are classified as Farm and Agricultural Land by the Snohomish County Assessor and are valued at their current use rather than "highest and best use." The other parcels in the area, however, are valued and taxed at their "highest and best use."

Availability of Public Services: Public services such as public water and sanitary sewer service physically located within and adjacent to the proposed site. However, sanitary sewer service is restricted by the GPP to UGAs. The existing sanitary sewer line is available by conditions in the shoreline substantial development permit to existing parcels zoned Rural Freeway Service.

Relationship or proximity to urban growth areas: The proposal site is approximately 0.9 miles from the Arlington city limits and is functionally separated from the City because it is within the Stillaguamish River floodplain. The southern tip of the proposal site is adjacent to the Arlington UGA.

Land Use Settlement Patterns and Compatibility with Agricultural Practices: Most of the proposal site is currently in farm use with interspersed residential and farm buildings.

Predominant Parcel Size: Predominant parcel sizes are large and of a size typically in areas designated as commercial farmland. Nine parcels are located within the 75.5 acres of the proposal site designated Riverway Commercial Farmland. Approximate sizes of these parcels are 20.7 acres, 15.8 acres, 2.9 acres and three smaller parcels.

Intensity of Nearby Uses: More intense land uses and urban land developments are located within the Rural Freeway Commercial node at the I-5/SR interchange that has existed essentially in its present configuration since 1968. Farmland is located immediately to the east, and, separated by I-5 to the west.

History of Land Development Permits Issued Nearby: No urban development permits have been issued in the vicinity of the proposal site except for the substantial shoreline development permit issued for the sewer line that serves only freeway commercial uses.

Land Values Under Alternative Uses: The area of the proposal site outside of Rural Freeway Service designation is in the floodway fringe area of the Stillaguamish River. Higher uses than farming would be difficult to locate in the area because of the floodplain constraints.

Proximity to Markets: Markets within Arlington, Marysville, and Stanwood are located in close proximity to the site.

1000 Friends Opening Brief, at 28-29, quoting PDS Report, at 5-6.

1000 Friends asserts that the evidence in the County's record supports maintaining agricultural designation for the land. Petitioners point out that the above text is supported in the DSEIS at 2-32 to 2-33. They also point out that the DSEIS concluded the Dwayne Lane site (except the northwest portion designated Rural Freeway Service) is properly designated agricultural and that removal of that designation would conflict with the statutory duties of the GMA. DSEIS, at 2-36. "Most of the proposed site is currently in farm use with interspersed residential and farm buildings." Index of the Record No. 22, DSEIS, at 2-33.

CTED agrees with 1000 Friends arguments concerning redesignation of agricultural resource lands. It observes that in a prior case:

> [The Board explained that when UGA expansions are challenged, the record must provide support for the actions the jurisdiction has taken; "otherwise the action may be determined to have been taken in error - *i.e.*, clearly erroneous;" accordingly, counties must "show their work" when a UGA is expanded. The work they must show is the completion of a valid land capacity analysis, and any expansion of a UGA must be supported by that land capacity analysis.

CTED'S Opening Brief, at 21, quoting *Kitsap Citizens*,[3] at.13.

Petitioners 1000 Friends and Stillaguamish Flood Control District requested that the Board enter a finding of invalidity for Ordinance No. 03-063. 1000 Friends PFR, at 5. Petitioner CTED did not join in the request for Invalidity.

In addition, CTED asserts Ordinance 03-063 fails to comply with RCW 36.70A.060, RCW 36.70A.170, and RCW 36.70A.020(8) when the ordinance re-designates agricultural lands in the Island Crossing area for urban commercial development, and

[3] *Kitsap Citizens for Rural Preservation v. Kitsap County* (***Kitsap Citizens***), CPSGMHB Case No. 00-3-0019c, Final Decision and Order, May 29, 2001.

places them into the Arlington UGA, even though the agricultural lands continue to meet the statutory criteria for designation. CTED'S Opening Brief, at 30. CTED cites Board precedent regarding local governments' duties under the GMA to conserve agricultural lands:

> In *Green Valley, et al., v. King County* (No. 98-3-0008c), this Board characterized the GMA's several agricultural lands provisions as creating an "agricultural conservation imperative that imposes an affirmative duty on local governments to designate and conserve agricultural lands to assure the maintenance and enhancement of the agricultural resource industry."

Id., at 31.

CTED points out that the Board's *Green Valley* decision was affirmed by the State Supreme Court, as follows:

> In summary, the agricultural lands provisions (RCW 36.70A.020(8), .060, and .170) direct counties and cities (1) to designate agricultural lands of long-term commercial significance; (2) to assure the conservation of agricultural land; (3) to assure that the use of adjacent lands does not interfere with their continued use for agricultural purposes; (4) to conserve agricultural land in order to maintain and enhance the agricultural industry; and (5) to discourage incompatible uses ...
>
> Although the planning goals are not listed in any priority order in the Act, the verbs of the agricultural provisions mandate specific, direct action. The County has a duty to designate and conserve agricultural lands to assure the *maintenance* and enhancement of the agricultural lands to assure the maintenance and enhancement of the agricultural industry."

Id., at 32, quoting the Supreme Court's language in *King County v. Central Puget Sound Growth Management Hearings Board*, 142 Wn.2d 543, 558, 14 P.3d 133 (2000).

To support its assertion that landowner intent is not the controlling factor in determining the long-term commercial significance of agricultural resource lands, CTED cites the initial Supreme Court case that addressed the GMA's agricultural resource lands provisions:

> [T]here are compelling reasons against concluding the Legislature intended current use or land owner intent to control the designation of natural resource lands under the GMA. First, if current use were a criterion, GMA comprehensive plans would not be plans at all, but mere inventories of current land use. The GMA goal of maintaining and enhancing natural resource lands would have no force; it would be subordinate to each individual land owner's current use of the land ...

> Second, if land owner intent were the controlling factor, local jurisdictions would be powerless to preserve natural resource lands...All a land speculator would have to do is by agricultural land, take it out of production, and ask the controlling jurisdiction to amend its comprehensive plan to remove the "agricultural land" designation...[T]he controlling jurisdiction would have no choice but to do so, because the land is no longer being used for agricultural purposes.

Id., at 33, quoting *Redmond v. Central Puget Sound Growth Management Hearings Board*, 136 Wn.2d 38, 52-53, 959 P.2d 1091 (1998).

CTED asserts the agricultural lands in the Island Crossing area continue to qualify for designation as agricultural lands of long-term commercial significance under the GMA. *Id.*. CTED cites to the DSEIS, at 2-26, to describe the consequences that the adoption of Ordinance No. 03-063 would have for the agricultural lands in the Island Crossing area as well as abutting agricultural lands in the Stillaguamish Valley:

> Approval of the Comprehensive Plan Amendment and concurrent rezone to General Commercial would result in new development on portions of the subject site that are currently undeveloped or in agricultural use. This analysis assumes that existing freeway service uses would remain in place and new development would replace existing agricultural and single-family residential uses....
>
> Compatibility of Use and Intensity
>
> Future commercial development on the subject site would occur at intensities significantly greater than exiting conditions and would increase activity levels in the area. This development would be compatible with existing commercial uses located within the site and to the west of I-5. I-5 would provide a barrier to the west between the potential commercial development and existing agricultural lands. However, because of the intensity of proposed commercial uses, this development would be incompatible with agricultural uses located to the north and east of the site.
>
> Cumulative Impacts
>
> In conjunction with other proposed development in Snohomish County the Proposed Action would contribute to cumulative increases in county land converted from agricultural to commercial uses. This growth would continue to increase the local demand for public facilities and services.

Id., at 34-35.

CTED agrees with 1000 Friends that the DSEIS concluded that the lands in Island Crossing designated for agriculture prior to the adoption of Ordinance 03-0063 continued to meet the statutory criteria for designation as agricultural lands of long term commercial significance. In addition, CTED points to the DSEIS:

> *The County's records establish that the Dwayne Lane site (except for the northwest portion designated Rural Freeway Service) is properly designated agricultural and that removal of that designation would conflict with the statutory duties of the GMA.* Also, the removal of the Riverway Commercial Farmland designation does not meet the criteria in the County's GPP for redesignation of agricultural land and would be inconsistent with recent cases regarding agricultural land redesignation before the Central Puget Sound Hearings Board and the Washington State Supreme Court. When the Snohomish County Council considered the designation of the site in 1998, it concluded that the site met the criteria for designation as agricultural land of long-term significance as defined in the GPP and met the State's minimum guidelines for classification as agricultural lands under GMA. *Circumstances have not changed since this Council decision in 1998.*

Id., at 37. Emphasis by CTED.

CTED also provides that the "Staff Report recommended that the County Council reject the proposed ordinance, based in part on the following summary conclusion related to agricultural designation:

> 1. The proposal by Dwayne Lane to expand the Arlington UGA and amend the GPP's FLUM to redesignate 110.5 acres from Rural Freeway Service and Riverway Commercial Farmland to Urban Commercial is not consistent with the policies under Goal LU7 in the GPP to conserve agricultural land. *The proposal site is composed of prime agricultural soils and meets all of the criteria in the GPP under Implementation Measure LU 7a for continued designation as agricultural land of long-term significance as defined by the GPP.*
>
> *Additionally, consideration of the state's minimum guidelines in the Washington Administrative Code (WAC) indicates that the Dwayne Lane site should continue to be classified as agricultural lands under the GMA.*

Id., at 37-38, quoting PDS Report, at 14, emphasis by CTED.

2. Respondent and Intervenor

Snohomish County asserts that Petitioners' arguments ignored considering the land's proximity to population areas and the possibility of more intense uses of land when determining whether land is of long-term commercial significance. Snohomish County's Response Brief, at 12. Snohomish listed the ten CTED guidelines and acknowledged

them as the specific indicators to assist jurisdictions in considering the effects of proximity to population areas and the possibility of more intense uses of land. *Id.*, at 13. Snohomish provides as evidentiary support the text from the County Council's findings of fact and conclusions in the signed and passed Amended Ordinance 03-063. *Id.*, at 14-15. It did not provide the results from the PDS Report and DSEIS.

Snohomish asserts that the County Council considered the recommendations of the Planning Commission; the County Planning staff; the guidelines in the GMA and CTED; and reviewed all public testimony and comments before making its decision. Snohomish Response Brief, at 14.

Intervenor Lane contends that the land in Island Crossing is urbanized in nature, does not meet the standards to classify it as agricultural, and is properly designated urbanized and properly placed in Arlington's UGA. Lane Response, at 7. Lane claims that the "110.5 acre site already contains several businesses and public utilities services," and that the "land is approximately 4000 feet from the Arlington city limits and actually abuts the Arlington UGA on the South." *Id.*, at 8. Intervenor also argues that Island Crossing has an "urbanized character of land under the GMA" because of the "existing water/sewer line." *Id.*

In reviewing the guidelines from WAC 365-190-050, Lane argues the land is not devoted to agriculture because: 1.) the parcel owned by Lane has not been actively farmed on a commercially productive basis for nearly thirty years; 2.) evidence of the record shows that small-scale farms have not been commercially successful in the area for a number of years; 3.) due to the heavy use of roads surrounding the property, farming the land is not only unproductive, it is hazardous; and 4.) Mrs. Winter actually wanted to farm the land but could not. *Id.*, at 12. In addition, Intervenor asserts that, while landowner intent is not the controlling factor in determining whether land is devoted to agriculture or not, however land owner intent is to be considered along with other factors in making a proper designation. *Id.*, at 13.

Lane states the land use settlement patterns and their compatibility with agricultural practices do not support an agricultural determination. *Id.*, at 16. "A portion of the Island Crossing area is already developed as Freeway Service. It is made up of approximately 35 acres and contains three gas stations, three restaurants, a motel, and espresso stand, hay harvesting and two single-family homes. In addition, roadside services are operated by the Stillaguamish Tribe on a 2.5 acre triangular parcel at the Smokey Point Boulevard and State Route 530 intersection." *Id.*, at 15.

Intervenor asserts that the staff recommendation was dated February 24, 2003, and the "inquiry made by the staff to determine designation was made under the auspices of this Board's holding that in order to show an agricultural parcel be de-designated from agricultural land, the evidence must show "demonstrable and conclusive evidence the Act's definitions and criteria for designation" are no longer met. *Id.*, at 18. Lane argues that the staff believed the applicant must "present demonstrable and conclusive evidence of changed circumstances to justify it de-designation." *Id.* However, Lane states the

Court of Appeals clarified the standard utilized by the Board and that the county staff did not have the benefit of that guidance. *Id.* Intervenor also states that after the PDS report, hearings were held before the council on July 9, 2003, which included testimony and other evidence which now comprise the complete record before the Council. *Id.,* at 19.

Lane attacks the PDS report/discussion regarding the application of the GMA guidelines contains as inconsistent and inaccurate. *Id.,* at 19. Lane asserts the following:

> For the availability of public facilities, the report concludes that sewer service is limited by shoreline issues and permitting limitations, which is contrary to the statutory mandate that permitting issues are not to be utilized for planning decisions (RCW 36.70A.470(1)(a). *Id.*
>
> For tax status, the PDS report admits that only 32% of the land is taxed as agricultural, and that under the current configuration, not even a majority of the land is carried as agricultural land. *Id.,* at 19
>
> For land use settlement patterns and compatibility with agricultural practices, the PDS report finds "most" of the area is in current farm use, yet the report shows less than half (32%) of the property is taxed as agricultural land. The report fails to note the adverse impact traffic patterns have on any farming activities.
>
> For history of land development permits issued nearby, the record shows that over 200 homes have been constructed on nearby property over the last ten years (see index #127 CPSGMHB, items 23 and 67 in HBA packet.)
>
> For sewer service boundary, the property has a portion of land which has been included in sewer service boundaries pursuant to agreement between the Cities of Marysville and Arlington.

Id., at 19-23.

Analysis

As this Board has previously observed, there are two requirements in the designation, or de-designation, of agricultural lands under the Growth Management Act. "The first is the requirement that the land be "devoted to" agricultural usage. The second is that the land must have 'long-term commercial significance' for agriculture." *Hensley VI*, at 36.[4]

1. Are the 75.5 Acres at Island Crossing "devoted to" agriculture"?

The Board answers this question in the affirmative. A plain reading of the Supreme Court's holdings suggests that if land has ever been *used for agriculture* or is *capable of*

[4] *Hensely, et al., v. Snohomish County (**Hensely VI**)*, CPSGMHB Case No. 03-0-0009c, Final Decision and Order, Sep. 22, 2003.

being used for agriculture, it meets the "devoted to" prong of the test. *Redmond v. Central Puget Sound Growth Management Hearings Board* (***Redmond***), 136 Wash. 2d 38 (1998), at 53. There does not appear to be a dispute regarding whether the 75.5 acres at Island Crossing have ever been farmed, so the Board arguably could end that part of its inquiry here. However, because the County focuses much of its argument on the contention that soils conditions somehow preclude agricultural use at Island Crossing, the Board will proceed.

Here, Petitioners have made a *prima facia* case supporting the assertion that there have been no changes to the soil condition, nor any changed circumstances that could support the County's revision of the 75.5 acres from agricultural resource lands to non-agricultural resource lands commercial uses. Petitioners rely upon Board and Court case law, evidence in the record (regarding soil classification systems and long-term commercial significance) to undercut the County's assertion that its action is supported by the record.

For example, Petitioner CTED disputes the "Finding No. 7" of Ordinance No. 03-063 that "Farming is no longer financially viable at Island Crossing." CTED argues: "Related to finding number 7, the ordinance also includes a finding based on testimony received from a landowner in the Island Crossing area who testified the land could not be profitably farmed . . . None of these findings justifies the dedesignation of agricultural lands in the Island Crossing area." CTED PHB, at 38.

CTED cites federal soils information to overcome the County's assertion that the Puget soils found at Island Crossing are not "prime." Petitioner asserts that whether or not Ragnar soils are the "best" soils for agricultural production is not the proper analysis since: "Logically, only one soil type could be the 'best.' The appropriate analysis is to examine soil types by reference to growing capacity, productivity, and soil composition." *Id.* In order to compare the Ragnar soils that the County identifies as the "best" with the Puget soils that predominate at Island Crossing, CTED cites information from the U.S. Department of Agriculture, Natural Resource Conservation Service classifying Snohomish County soils.

From a review of the information contained in a table derived from that federal website,[5] the Board agrees with CTED's contention that "Neither soil type is uniformly superior to the other. Both soils types are considered 'prime agricultural soils'." CTED PHB, at 39. For the County to conclude otherwise, and more fundamentally for the County to conclude that the Riverway Commercial Farmland acreage at Island Crossing was not "devoted to" agricultural use, was clear error.[6]

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[5] Pursuant to WAC 242-02-670(2), the Board takes official notice of U.S. Department of Agriculture soils information on Snohomish County posted at www.or.nrcs.usda.gov/pnw_soil/washington/wa661.html .

[6] As the Board noted in a recent Snohomish County case:

> T]he County did not alter its criteria for designating agricultural land to include *only those soils*, according to SCS soils capability criteria, *without constraints*, such as drainage limitations. Had the County done so, the necessity to "de-designate existing agricultural lands," which no longer met its designation criteria, would have likely affected far more designated agricultural land than the . . . area affected by the

2. Do the 75.5 acres of land at Island Crossing have long-term commercial significance?

Again, the Board answers in the affirmative. The County relies upon its Finding T, set forth in Finding of Fact 3 *supra*, to support its conclusion that the Riverway Commercial Farmland no longer has long-term commercial significance. The "evidence" relied upon is testimony from an individual who operated a dairy farm in the vicinity fifty years ago who opined that she sold her farm "because the land could not be profitably farmed." Ex. 111. Anecdotal testimony, particularly from an individual whose direct experience with the area is decades removed from the present and whose declared expertise was in dairy rather than crop farming, does not constitute credible evidence on which to support the County's action. Also, as Petitioners noted, this "Finding" was contradicted by others with present-day experience in crop farming in the Stillaguamish Valley. 1000 Friends Opening Brief, at 23.

Further damaging to the credibility of the County's reasoning supporting its action is that nowhere do Respondent or Intervenor cite to credible, objective evidence to refute or reconcile the substantial record evidence (*i.e.*, the PDS report, the DSEIS, USDA soils survey) to the contrary. The Board acknowledges the County's assertion that the Council *considered* the contrary recommendations of the County Planning staff and Agriculture Advisory Board, as well as the guidelines in the GMA, CTED's procedural criteria, and reviewed all public testimony and comments before making its decision. Snohomish Response Brief, at 14. To the extent that there is no dispute that this evidence was placed before the Council before it took action adopting Ordinance No. 03-063, it can be said that the legislative body "considered" that evidence. However, the only record support cited by the County and Intervenor in support of dedesignation are far less credible than the substantial contrary evidence in this record.

As discussed, *supra*, County "Finding B.6" which asserts that "Puget Soils are not prime" is not supported by objective soils science, nor can the Board assign much weight to the dated, anecdotal testimony referenced in "Finding T." Even less weight can be accorded to the unsupported and conclusory statements of the County's "Finding B.7" [Farming is no longer financially viable] and "Finding B.8" [The County is growing rapidly and it is inevitable that sites like Island Crossing will be converted from agricultural uses to commercial uses.] These latter two findings are expressions of intent or opinion, rather than objective, scientifically respectable facts.

To the extent that the County and Intervenor rely upon the materials prepared by the consulting firm of Higa-Burkholder, the Board notes that this information was prepared at the behest of Mr. Dwayne Lane,[7] prime sponsor of the "Dwayne Lane Proposal for 2003 Final Docket Amendments." Mr. Lane is one of the property owners in the Island

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> amendment. Instead, without amending its own agricultural land soils designation criteria, the County apparently decided that a new soil constraint criterion, regarding drainage, should be applied only to this area.

Hensley VI, at 37 , footnote omitted.

[7]Counsel for Intervenor Lane stated that Mr. Burkholder, author of the HBA Report cited in support of the County's action, was retained by Mr. Lane. Transcript, at 70.

Crossing area and has specific interests and intentions relative to the land use of his property.[8] Therefore, the Board construes any record declarations or conclusions entered by Mr. Lane's consultants to be reflections, if not direct expressions, of "landowner intent" and assigns them the appropriate weight (*i.e.*, expressions of landowner intent, alone, are not determinative). As to the arguments presented in Intervenor's briefing, the Board is not persuaded that they provide support to the County's action de-designating agricultural resource lands and including Island Crossing in the UGA. Lane asserts that Island Crossing is "urbanized in nature" due to the existing improvements, including freeway service structures (Lane Response, at 16) and utility lines (Lane Response, at 7-8) nearby. The Board rejects this reasoning. We agree with Petitioners that the commercial uses presently in Island Crossing are, as the County has correctly designated them for years, "Freeway Service" uses, not urban uses. As to the proximity of utility service, the Board notes that their availability is in dispute, in view of permit and Shoreline Master Program restrictions. Even if there were no such restrictions, the mere presence of utility lines does not mandate urbanization.[9] As for the Intervenor's arguments regarding the Lane parcel having "not been actively farmed" for thirty years (Lane Response, at 12), the Supreme Court's language regarding "devoted to" makes no distinction about whether land was farmed thirty days or thirty years ago.

The Board also rejects the argument that off-site impacts of the County's action are limited. If the limited commercial freeway service uses now at Island Crossing create "hazardous" impacts for existing agricultural activities (Lane Response, at 13), how can those same impacts on surrounding areas be any less from the panoply of urban uses allowed in the County's "General Commercial" zone? A review of the geometry and topography of this area (Findings of Fact 8 through 17) shows that the County's action would truly create an "urban island" almost completely surrounded by resource lands.

Moreover, no record evidence supports the assertion in Ordinance No. 03-063 "Finding S" that this action "is not precedent for redesignation of Agricultural Land in the Stillaguamish Valley." It is an axiom of land use planning that urban uses at urban densities and intensities inhibit adjacent farm operations, and the County points to no evidence here to expect a different result in the immediate vicinity. The very fact that it felt compelled to declare that this action "is not a precedent" suggests that even the County Council anticipates the real estate speculation and conversion pressures that Ordinance No. 03-063 would fuel. Even assuming the best of intentions in "Finding S," there is no record evidence to suggest that the County's simple declaration can stem what historically has been an unyielding tide.

In summary, the Board concludes that the County's Ordinance draws scant credible and objective support from the record. In contrast, the arguments advanced by Petitioners,

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[8]Mr. Lane's ambitions to place an automobile dealership on his property at Island Crossing is chronicled not only in this record, but prior litigation regarding Island Crossing. *See* generally Dwayne Lane Motion to Intervene.

[9]The Board has previously observed that mere adjacency to urban services, such as utilities, or city limits "does not impose requirement that this territory be included within a UGA, unless existing cities cannot accommodate the additional projected growth and it is otherwise an appropriate location for such growth." *Tacoma v. Pierce County*, CPSGMHB Case No. 94-3-0001, Final Decision and Order, Jul. 5, 1994.

are supported by credible and objective evidence in the record. The record suggests that the land continues to meet the criteria for the designation of agricultural land. This is true regarding the question of prime farmland soil characteristics and whether the 75.5 acres are of long-term commercial significance. Contrary to the County's Ordinance Finding, the record weighs heavily toward the denial of the de-designation. The Board's review of the record and arguments presented, leads to the conclusion that the 75.5 acres previously designated as Riverway Commercial Farmland are **devoted to agriculture** and **continue to be of long-term commercial significance** and should not have been de-designated from the Riverway Commercial Farmland designation and A-10 zoning.

The Board concludes that the County's action removing the resource lands designation from 75.5 acres at Island Crossing was unsupported by the record and therefore was **clearly erroneous**. The Board therefore concludes that the County's reclassification of those lands from Riverway Commercial Farmland to Urban Commercial and the rezoning of them from Agriculture-10 Acres to General Commercial (CG) as contained in Ordinance No. 03-963, **does not comply** with the requirements of RCW 36.70A.170(1)(a), and RCW 36.70.060(1) and WAC 365-190-050 (pursuant to RCW 36.70A.050 and .170(1)(a)). Because RCW 36.70A.050 creates a duty for DCTED in its role adopting guidelines pursuant to WAC 365-190-050, rather than a duty for local governments, the Board dismisses the portion of Legal Issue No. 2 that alleges County noncompliance with RCW 36.70A.050.

3. Conclusions re: Legal Issue 2

The Board concludes that the Petitioners have carried the burden of proof to show that Snohomish County Ordinance No. 03-063 **failed to be guided by and did not substantively comply** with RCW 36.70A.020(8) and that it **failed to comply** with RCW 36.70A.040, .060(1) and .170(1)(a). The Board finds that the County's action was **clearly erroneous** in concluding that this land no longer meets the criteria for designation as agricultural land of long-term commercial significance. The Board will **remand** Ordinance No. 03-063 for the County to take legislative action to bring it into compliance with the goals and requirements of the Act.

C. URBAN GROWTH AREA EXPANSION ISSUES

Legal Issue No. 1

Does the County adoption of Amended Ordinance No. 03-063, establishing a new and larger Urban Growth Area (UGA) for the City of Arlington (Arlington), fail to comply with RCW 36.70A.020(1), (2), (8), and (10) (planning goals requiring encouragement of urban growth in urban areas, reduction of sprawl, enhancement of natural resource industries and protection of the environment), RCW 36.70A.110 and RCW 36.70A.215 (limiting UGA expansions to land necessary to accommodate projected future growth and setting priorities for the expansion of urban growth areas) when the record fails to establish that the expansion is supported by a land use capacity analysis and that this

larger UGA is necessary to accommodate OFM population forecasts as required under the GMA?

Legal Issue No. 4

By expanding the Arlington UGA without a supporting land use capacity analysis that demonstrates additional commercial land is needed in the Arlington UGA, is Snohomish County Amended Ordinance No. 03-063 in noncompliance with Policy UG-14 of the Snohomish County County-Wide Planning Policies and therefore in noncompliance with RCW 36.70A.210(1)?

1. Applicable Law

Several provisions of the GMA are intertwined as they relate to the location, sizing, review and evaluation and expansion of UGAs. RCW 36.70A.110, and .215 deal directly with UGAs and their evaluation and expansion. RCW 36.70A.210 provides that county-wide planning policies are to be adopted to, among other things, implement the provisions of RCW 36.70A.110. Several GMA Goals from RCW 36.70A.020 also address where urban growth should be, or should not be, encouraged. The provisions of the Act challenged by Petitioners are set forth below.

RCW 36.70A.110 generally addresses the creation of UGAs.. RCW 36.70A.110(1) deals with locational criteria for delineating boundaries of UGAs, and .110(3) pertains to locating or sequencing urban growth within UGAs. RCW 36.70A.110(2) regards sizing UGAs; it provides in relevant part:

> Based upon the growth management population projection made for the county by the office of financial management, the county and each city within the county shall include areas and densities sufficient to permit the urban growth that is projected to occur in the county or city for the succeeding twenty-year period. Each urban growth area shall permit urban densities and shall include greenbelt and open space areas. An urban growth area determination may include a reasonable land market supply factor and shall permit a range of urban densities and uses. In determining this market factor, cities and counties may consider local circumstances. Cities and counties have discretion in their comprehensive plans to make many choices about accommodating growth.

RCW 36.70A.210 requires the County, in collaboration with its cities, to adopt county-wide planning policies which are to be "used solely for establishing a county-wide framework from which county and city comprehensive plans are developed and adopted pursuant to this chapter."

The GMA's Goals are to "guide the development of comprehensive plans and development regulations." With regard to the legal issues in this case, the relevant Goals of RCW 36.70A.020 are:

(1) Urban growth. Encourage development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner.
(2) Reduce sprawl. Reduce the inappropriate conversion of undeveloped land into sprawling, low -density development.
. . . .
(8) Natural resource industries. Maintain and enhance natural resource-based industries, including productive timber, agricultural, and fisheries industries. Encourage the conservation of productive forest lands and productive agricultural lands, and discourage incompatible uses.
. . . .
(10) Environment. Protect the environment and enhance the state's high quality of life, including air and water quality, and the availability of water.

RCW 36.70A.215(1) requires the County and its cities to adopt county-wide planning policies to establish a review and evaluation program – the "buildable lands" report and review. The purpose of the review and evaluation program is to:

(a) Determine whether a county and its cities are achieving urban densities within urban growth areas by comparing growth and development assumptions, targets, and objectives contained in the county-wide planning policies and the county and city comprehensive plans with actual growth and development that has occurred in the county and its cities; and
(b) Identify reasonable measures, other than adjusting urban growth areas, that will be taken to comply with the requirements of this chapter.

The first evaluation, or "buildable lands report," was to be completed by September 1, 2002. RCW 36.70A.215(2)(b). The evaluation component, described in RCW 36.70A.215(3), is required to:

(a) Determine whether there is *sufficient suitable land to accommodate the county-wide population projection* established for the county pursuant to RCW 43.62.035 and the subsequent population allocations within the county and between the county and its cities and the requirements of RCW 36.70A.110;
(b) Determine the *actual density of housing* that has been constructed and the *actual amount of land developed for commercial and industrial uses within the urban growth area* since the adoption of a comprehensive plan under this chapter or since the last periodic evaluation as required by subsection (1) or this section; and
(c) Based upon the actual density of development as determined under (b) of this subsection, *review the commercial, industrial and housing needs by type and density range to determine the amount of land*

needed for commercial, industrial and housing for the remaining portion of the twenty-year planning period used in the most recently Petitioners 1000 Friends and Stillaguamish Flood Control District requested that the Board enter a finding of invalidity for Ordinance No. 03-063. 1000 Friends PFR, at 5. Petitioner CTED did not join in the request for Invalidity.

(Emphasis supplied).

Snohomish County CPP UG-14(d), as amended by Section 2 of Ordinance No. 03-072, [Exhibit J to CTED Opening Brief], (new language is shown underlined; deleted language is shown in ~~strikeout~~) provides in relevant part:

d. **Expansion of the Boundary of an Individual UGA**: Expansion of the boundary of an individual UGA to include additional residential, commercial and industrial land shall not be permitted unless it is supported by a land capacity analysis adopted by the County Council pursuant to RCW 36.70A.110 and otherwise complies with the Growth Management Act, includes consultation with appropriate jurisdictions in the UGA or MUGA, and one of the following ~~four~~ ten conditions are met; provided that conditions six through eight do not apply to the Southwest UGA:

. . .

4. ~~Both of the following conditions are met f~~For expansion of the boundary of an individual UGA to include additional commercial and industrial land~~:~~,
   a. ~~T~~the county and city or cities within that UGA document that commercial or industrial land consumption within the UGA (city plus unincorporated UGA combined) since the start of the twenty-year planning period, equals or exceeds fifty percent of the developable commercial or industrial land supply within the UGA at the start of the planning period. In UGAs where this threshold has not yet been reached, the boundary of an individual UGA may be expanded to include additional commercial or industrial land if the expansion is based on an assessment that concludes there is a deficiency of larger parcels within that UGA to accommodate the remaining commercial or industrial growth projected for that UGA. Other parcel characteristics determined to be relevant to the assessment of the adequacy of the remaining commercial or industrial land base, as documented in the ~~Procedures Report required by UG-14(a)~~ most recent Snohomish County Tomorrow Growth Monitoring Report of the bulidable lands review and evaluation (Buildable Lands Report), as they may be confirmed or revised based upon any new information presented at public hearings, may also be considered as a basis for expansion of the boundary of an individual UGA to include additional commercial or industrial land.~~;~~ ~~and~~
   b. ~~The county and the city or cities within the UGA consider reasonable measures adopted as an appendix to the Countywide Planning Policies pursuant to UG-14(b) that could be taken to increase commercial or~~

~~industrial land capacity inside the UGA without expanding the boundaries of the UGA.~~

. . .

10. The expansion will result in the economic development of lands that no longer satisfy the designation criteria for natural resource lands and the lands have been redesignated to an appropriate non-resource land use designation. Provided that expansions are supported by the majority of the affected cities and towns whose UGA or designated MUGA is being expanded and shall not create a significant increase in the total employment capacity (as represented by permanent jobs) of an individual UGA, as reported in the most recent Snohomish County Tomorrow Growth Monitory (*sic*) Report in the year of expansion.

2. Discussion

Positions of the Parties

1. Petitioners

1000 Friends argues that the Island Crossing UGA expansion does not comply with the Act for four reasons: 1) the expansion is isolated from any area characterized by urban growth; 2) there is no basis in the record supporting the need for additional urban land to accommodate the projected population growth; 3) the expansion is into designated agricultural lands; and 4) the expansion area contains critical areas. 1000 Friends' Opening Brief, at 8 – 17.

CTED contends that Ordinance 03-063 fails to comply with RCW 36.70A.110, RCW 36.70A.215 and RCW 36.70A.210(1) because the ordinance expands the Arlington UGA to include the Island Crossing area and redesignates the Island Crossing area for urban commercial development without the supporting land use capacity analysis that demonstrates additional commercial land is needed in the Arlington UGA. CTED asserts that under RCW 36.70A.110 and RCW 36.70A.215, the size and location of urban growth areas must be supported by a land capacity analysis, and states that in *Master Builders Association v. Snohomish County*[10], the Board held that changes in the size of an urban growth area must be supported by a land use capacity analysis: "If UGAs are altered and challenged, which is not the case here, this Board requires an accounting to support the alteration." CTED Opening Brief, at 20.

Further, CTED contends that the County's Final Buildable Lands report does not support the need for additional commercial or industrial land. CTED notes that the County's DSEIS and staff reports confirm this conclusion. "The proposed expansion of the Arlington UGA for additional commercial/industrial capacity does not meet Policy UG-14's 50% threshold condition under either scenario. . . Approval of the Dwayne Lane

[10] CPSGMHB Case No. 01-3-0016, Final Decision and Order, Dec. 13, 2001.

proposal would, therefore, be inconsistent with GPP and CPP policies regarding review and evaluation of boundary expansions to an individual UGA." *Citing* DSEIS at 2-36 to 2-37, *Id.*, at 25. Additionally, [the proposed UGA expansion] "is inconsistent with Countywide Planning Policy UG-14 and GPP Policy LU 1.A.9 since the proposed expansion of the Arlington UGA for additional commercial/industrial capacity does not meet the 50% threshold condition in [these CPPs and GPPs]. *Citing* Staff report at 14, *Id.*, at 26.

Finally CTED concludes "There is nothing in the [buildable lands report] that supports the expansion of the Arlington UGA to include the Island Crossing area." *Id.*, at 27.

2. Respondent and Intervenor

In response, Snohomish County contends that in expanding the UGA it "concluded that Island Crossing is already characterized by urban growth." County Response, at 16. To support this conclusion the County noted the area's proximity to the existing Arlington UGA, and noted a commercial area on the northern edge of Island Crossing, which contains impermeable surfaces and water and sewer service which could be available to the Island Crossing area. County Response, at 16-17.

Intervenor acknowledges that the County's existing land capacity analysis may not have supported expansion, but CPP UG-14(a)(4) [*sic* (d)(4)], as recently amended, allows for revision if new information is presented at public hearings. Lane Response, at 24-25. Intervenor continues, "[CPP UG-14(d)(4)] does not specify the date of the land capacity analysis which must be used to support a change in the UGA. If a valid capacity analysis exists, the criteria for change in UG-14 may be applied in consideration of the most recent capacity analysis." *Id.*, at 26.

3. Petitioners' Reply

1000 Friends replies that the commercial area on the northern edge of the Island Crossing UGA expansion area is a "Rural Freeway Service" area designated to serve travelers with limited sewer access to serve the newly established UGA; further, it is not characterized by urban growth, since it serves the traveling public and surrounding rural population. 1000 Friends Reply, at 24. Additionally, Petitioners argue that the UGA expansion area is not adjacent to lands characterized by urban growth since the Arlington UGA only "touches Island Crossing at the southern tip" of the area. *Id.*, at 25.

CTED reiterates that there is no land capacity analysis, or information in the buildable lands report, that supports a UGA expansion into the Island Crossing area. CTED Reply, at 9-10. Also, CTED contends that the expansion area only touches the Arlington UGA via a right-of-way along the roadway; and that the limited commercial development at the freeway interchange does not make it urban in character, even if a sewer line is present at the edge of the area. *Id.*, at 11.

Analysis

In its discussion of Legal Issue 2, *supra*, the Board concluded that removing the resource land designation for the area and designating it as urban commercial did not comply with the relevant provisions of the Act.[11] The Board now turns to whether the inclusion of the area into the UGA complies with the GMA.

As to whether the expanded UGA for Island Crossing meets the *locational* requirements of RCW 36.70A.110, the Board agrees with Petitioners. The closest point of contact between Arlington's city limits and private property within the expansion area is approximately 700 feet. *See* Findings of Fact 10 through 14. Also, the fact that limited sewer service is adjacent to, or even existing within, a rural area is not dispositive on the question of whether the area is urban in character.[12] Therefore, the Board concludes that the subject property is not "adjacent to land characterized by urban growth," and does not comply with RCW 36.70A.110(1).

As to the *sizing* requirements for UGAs as set forth in RCW 36.70A.110(2) and .215, and *consistency* with CPP UG-14(d) [RCW 36.70A.210(1)], the Board also agrees with Petitioners. First, neither the County nor Intervenor indicates that a revised land capacity analysis supporting the need for a commercial/industrial UGA expansion has been conducted. *See* County Response, at 16-17; and Lane Response, at 24-25. Intervenor even acknowledges that the existing land capacity analysis may not have supported expansion. *See* Lane Response, at 24-25. Second, CTED correctly argues that there is nothing in the County's recent Buildable Lands Report that supports the expansion of the Arlington UGA for commercial or industrial uses to include the Island Crossing area. The County does not dispute this assertion. *See* County Response, at 16-17. Intervenor Lane however, argues that CPP UG-14(d)(4)[13] allows the County to revise its land capacity analysis to reflect information obtained through public hearings, which Lane contends was provided in consideration of this action. Lane Response, at 25.

Nonetheless, there has not been a revision to the County's land capacity analysis that supports the expansion of this UGA for commercial or industrial uses. Therefore, the Board concludes that the expansion of the Arlington UGA to include the Island Crossing area does not comply with RCW 36.70A.110 and .215 and is not consistent with CPP UG-14(d) and RCW 36.70A.210(1). Further, since the County has **not complied** with the UGA requirements of RCW 36.70A.110, .215 and its own CPPs (RCW 36.70A.210),

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[11] The Board notes that RCW 36.70A.060 does not prohibit agricultural resource lands from being included within a UGA. However, RCW 36.70A.060(4) requires a program authorizing transfer or purchase of development rights as a condition precedent to such inclusion in the UGA. In this case, none of the parties argued or offered any evidence pertaining to whether such a program exists to allow agricultural land within the UGA.

[12] *See* footnote 9, *supra.*

[13] The Board notes that even if CPP UG-14(d)(10) is offered as the basis for this UGA expansion, the Board agreed with the County and held that CPP UG-14(d)(preamble) requires a land capacity analysis to support an individual UGA expansion for commercial/industrial development. In either case, the required land capacity analysis has not been conducted in the present case. *See CTED v. Snohomish County*, CPSGMHB Case No. 03-3-0017, Final Decision and Order, (Mar. 8, 2004), at 37-39.

the Board also concludes that the County's action **was not guided by Goals 1, 2, and 8** [RCW 36.70A.020(1), (2), and (8).

3. Conclusions re: Legal Issues 1 and 4

The Board concludes that the Petitioners have carried the burden of proof to show that Snohomish Ordinance No. 03-063 **failed to be guided by and did not substantively comply** with RCW 36.70A.020(1), (2), and (8) and that it **failed to comply** with RCW 36.70A.110, .210(1) and .215. The Board concludes therefore the County action adopting Ordinance No. 03-063 was **clearly erroneous** and will **remand** Ordinance No. 03-063 for the County to take legislative action to bring it into compliance with the goals and requirements of the Act as interpreted and set forth in this Order.

3. Conclusions re: Legal Issues 1 and 4

The Board concludes that the Petitioners have carried the burden of proof to show that Snohomish Ordinance No. 03-063 **failed to be guided by and did not substantively comply** with RCW 36.70A.020(1), (2), and (8) and that it **failed to comply** with RCW 36.70A.110, .210(1) and .215. The Board concludes therefore the County action adopting Ordinance No. 03-063 was **clearly erroneous** and will **remand** Ordinance No. 03-063 for the County to take legislative action to bring it into compliance with the goals and requirements of the Act as interpreted and set forth in this Order.

D. CRITICAL AREAS ISSUE

Legal Issue No. 5

By expanding the Arlington UGA into a frequently flooded area and by redesignating lands within that are for commercial use, is Snohomish County Amended Ordinance No. 03-063 in noncompliance with RCW 36.70A.060 and RCW 36.70A.170?

1. Applicable Law

RCW 36.70A.030(5) provides:

> "Critical areas" include the following areas and ecosystems: (a) Wetlands; (b) areas with a critical recharging effect on aquifers used for potable water; fish and wildlife habitat conservation areas; (d) frequently flooded areas; and (e) geologically hazardous areas.

RCW 36.70A.170 provides in relevant part:

> (1) On or before September 1, 1991, each county, and each city, shall designate where appropriate:
>
> . . .
>
> (d) Critical Areas.

RCW 36.70A.060 provides in relevant part:

> (2) Each county and city shall adopt development regulations that protect critical areas that are required to be designated under RCW 36.70A.170.

2. Discussion and Conclusions re: Legal Issue 5

The Board concludes that because it found, *supra*, that Ordinance No. 03-063 is noncompliant with the agricultural conservation and urban growth area provisions of the GMA, and remanded the Ordinance to the County, it need not and does not reach the question of whether the Ordinance fails to comply with RCW 36.70A.170(1)(d) and RCW 326.70A.060(2).

VIII. REQUESTS FOR INVALIDITY

Petitioners 1000 Friends and Stillaguamish Flood Control District requested that the Board enter a finding of invalidity for Ordinance No. 03-063. 1000 Friends PFR, at 5. Petitioner CTED did not join in the request for Invalidity. The question of whether or not the Board should enter a finding of invalidity for Ordinance No. 03-063 was framed in the PHO as Legal Issue No. 3, which provides:

Does the continued validity of the violations of RCW Title 36.70A (the Growth Management Act) described in Legal Issues 1 and 2 above, substantially interfere with the fulfillment of the goals of the Growth Management Act such that the enactments at issue should be held invalid pursuant to RCW 36.70A.302?

Applicable Law

RCW 36.70A.302 provides:

> (1) A board may determine that part or all of a comprehensive plan or development regulation are invalid if the board:
>
> (a) Makes a finding of noncompliance and issues an order of remand under RCW 36.70A.300;
>
> (b) Includes in the final order a determination, supported by findings of fact and conclusions of law, that the continued validity of part or parts of the plan or regulation would substantially interfere with the fulfillment of the goals of this chapter; and
>
> (c) Specifies in the final order the particular part or parts of the plan or regulation that are determined to be invalid, and the reasons for their invalidity.

(2) A determination of invalidity is prospective in effect and does not extinguish rights that vested under state or local law before receipt of the board's order by the city or county. The determination of invalidity does not apply to a completed development permit application for a project that vested under state or local law before receipt of the board's order by the county or city or to related construction permits for that project.

Findings of Fact and Conclusions of Law

In the Board's discussion of the UGA issues [Legal Issue Nos. 1 and 4] the Board found that the Arlington UGA expansion, as effectuated by Ordinance No. 03-063, did not comply with the requirements of RCW 36.70A.110, .210(1) and .215, and was not guided by RCW 36.70A.020(1), (2) and (8). Further, in the Board's discussion of the Agricultural Lands Issue [Legal Issue No. 2] the Board found that the redesignation of agricultural lands to general commercial, as effectuated by Ordinance No. 03-063, did not comply with the requirements of RCW 36.70A.040, RCW 36.70A.060(1) and RCW 36.70A.170(1)(a) and was not guided by RCW 36.70A.020(2) and (8). The question now becomes whether the continued validity of Ordinance No. 03-063 during the period of remand, would substantially interfere with the fulfillment of the Goals of the Act.

The Board's review of the facts and circumstances involved in the Arlington UGA expansion and loss of properly designated agricultural resource lands, as discussed *supra*, leads the Board to conclude that the continued validity of noncompliant Ordinance No.03-063 will substantially interfere with Goals (1), (2), and (8) of the Act. To permit urban land use activities in Island Crossing would substantially interfere with the fulfillment of Goal 8 because it would not "encourage the conservation of productive agricultural lands" within the portion of Island Crossing presently designated agricultural, nor would it "discourage incompatible uses" adjacent to the agricultural resource lands that surround Island Crossing on all sides. To expand the Arlington UGA in view of the County's admission that its own land capacity policies and inventory show no need for additional commercial land area would not "encourage development in [existing] urban areas" in contravention of Goal 1.

The County's action to convert lands from their proper agricultural designations to urban commercial uses and to include Island Crossing within the UGA flies in the face of Goals, 1, 2, and 8. It would violate the GMA's clear direction that urban growth should be directed to urban areas where services and facilities already exist and that UGAs should not be expanded absent a documented unmet need for additional urban land. Development of Island Crossing under the provisions of Ordinance No. 03-063 would immediately and perpetually impair resource land activities in the agricultural lands that surround it on all sides, ignite real estate expectations and speculation about conversion of those lands to urban designations, hasten future demand for urban level services and infrastructure in the surrounding area, and ultimately erode the long-term viability of the resource lands of the Stillaguamish River Valley. Such an outcome plainly violates the

GMA's "legislative mandate for the conservation of agricultural land." *King County v. Central Puget Sound Growth Management Hearings Board*, 142 Wn.2d 543, 558, 14 P.3d 133 (2000)

Therefore, the Board enters a **Determination of Invalidity with respect to the following portions of** Ordinance No. 03-063:

- The portion that expanded the Arlington urban growth area by 110.5 acres to include the Island Crossing area.
- The portion that replaced the 75.5 acre area of Riverway Commercial Farmland designation with an Urban Commercial designation
- The portion that rezoned the 75.5 acres of A-10 to General Commercial (GC)
- The portion that replaced the 35.5 acre area of Rural Freeway Service with an Urban Commercial designation
- The portion that rezoned the 35.5 acres of Rural Freeway Service (RFS) to General Commercial

IX. ORDER

Having reviewed and considered the above-referenced documents, having considered the arguments of the parties, and having deliberated on the matter, the Board ORDERS:

1. With respect to adoption of Ordinance No. 03-063, the Board issues Snohomish County a **finding of noncompliance** with RCW 36.70A.020(1), (2), (8), and (10) and .040, .060(1), .110, .170(1)(a) and .215.

2. The Board enters a **finding of invalidity** with respect to the following portions of Ordinance No. 03-063:

   - The portion that expanded the Arlington urban growth area by 110.5 acres to include the Island Crossing area.
   - The portion that replaced the 75.5 acre area of Riverway Commercial Farmland designation with an Urban Commercial designation
   - The portion that rezoned the 75.5 acres of A-10 to General Commercial (GC)
   - The portion that replaced the 35.5 acre area of Rural Freeway Service with an Urban Commercial designation
   - The portion that rezoned the 35.5 acres of Rural Freeway Service (RFS) to General Commercial

3. The Board establishes **4:00 p.m.** on **May 24, 2004** as the deadline for Snohomish County to take legislative action to achieve compliance with the goals and requirements of the GMA as interpreted and set forth in this Order.

4. By **Wednesday, June 2, 2004**, at **4:00 p.m.**, or within one week of taking the legislative action described in paragraph 2 above, whichever comes first, the County

shall submit to the Board, with a copy simultaneously served on Petitioners and Intervenor, an original and four copies of its Statement of Actions Taken to Comply (the **SATC**). Attached to the SATC shall be a copy of any legislative action taken in response to this Order.

5. By **Wednesday, June 9, 2004**, at **4:00 p.m.**, the Petitioners and Intervenor shall each submit to the Board, with a copy simultaneously served on opposing counsel, an original and four copies of any Response to the SATC.

6. The Board schedules a **Compliance Hearing** in this matter for **10:00 a.m.** on **Monday, June 14, 2004**. The Compliance Hearing will be held at the Board's offices at 900 Fourth Avenue, Suite 2470, in Seattle, WA. In the event that the County takes legislative action earlier than the date established in paragraph 2 above, it shall so notify the Board, after which the Board will issue a subsequent Order setting the revised date for Compliance Hearing.

So ORDERED this 22nd day of March 2004.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

_____
Bruce C. Laing, FAICP
Board Member

_____
Edward G. McGuire, AICP
Board Member

_____
Joseph W. Tovar, FAICP
Board Member

Note: This order constitutes a final order as specified by RCW 36.70A.300. Any party wishing to file a motion for reconsideration of this final order must do so within ten days of service of this order. WAC 242-02-830(1). Any party wishing to appeal this final order to superior court must do so within thirty days of service of this order. WAC 242-02-898.

APPENDIX D

COUNCIL DOCUMENT

SNOHOMISH COUNTY COUNCIL
SNOHOMISH COUNTY, WASHINGTON

AMENDED EMERGENCY ORDINANCE NO. 04-057

RELATING TO GROWTH MANAGEMENT; REVISING THE EXISTING URBAN GROWTH AREA FOR THE CITY OF ARLINGTON; ADOPTING MAP AMENDMENTS TO THE GROWTH MANAGEMENT ACT COMPREHENSIVE PLAN; AND ADOPTING COUNTY-INITIATED AREA-WIDE REZONES PURSUANT TO CHAPTER 30.74 SCC; AND AMENDING AMENDED ORDINANCE 94-125, ORDINANCE 94-120, AND EMERGENCY ORDINANCE 01-047

WHEREAS, the Growth Management Act, chapter 36.70A RCW (GMA) requires Snohomish County to designate an urban growth area (UGA) within which urban growth shall be encouraged and outside of which growth can occur only if it is not urban in nature (RCW 36.70A.110(1)); and

WHEREAS, the County Council designated a Final UGA for Arlington (Amended Ordinance 94-120) on June 28, 1995, after holding public hearings from April 19, 1994, through January 18, 1995, in conformance with the requirements of the GMA; and

WHEREAS, on June 28, 1995, the County Council approved Amended Ordinance 94-125 which adopted a GMA Comprehensive Plan including a General Policy Plan (GPP) and Future Land Use (FLU) map; and

WHEREAS, the County Council amended the Final UGA for Arlington on July 23, 2001 (Emergency Ordinance 01-047) in conformance with the requirements of the GMA; and

WHEREAS, RCW 36.70A.130 and 36.70A.470 direct counties planning under the GMA to adopt procedures for interested persons to propose amendments and revisions to the comprehensive plan or development regulations; and

WHEREAS, the County Council adopted chapter 30.74 SCC to comply with the requirements of RCW 36.70A.130 and .470 to allow interested persons to propose amendments to the GMA comprehensive plan and/or development regulations; and

WHEREAS, Snohomish County Department of Planning and Development Services (PDS) staff, pursuant to the SCC 30.74.030, reviewed all proposals on the docket and determined that twenty-one of the proposals could be reviewed and analysis could be completed within the time frame of the 2003 final docket review cycle, including the proposal by Dwayne Lane to amend the Arlington UGA boundary; and

WHEREAS, the 2003 final docket – Phase 1 included proposals to amend the GPP FLU map submitted by Jerry Booker, City of Everett, Frank Heath, NORETEP, Snohomish County Department of Public Works, Dwayne Lane, Eddie Bauer, and Wellington Morris; and

WHEREAS, pursuant to Chapter 30.74 SCC, PDS completed final review and evaluation of the 2003 final docket – Phase 1, including rezones to implement proposals to amend the GPP FLU map, and forwarded a recommendation to the Snohomish County Planning Commission; and

WHEREAS, the Planning Commission held hearings on the Dwayne Lane proposal including the proposal to amend UGA boundaries, on February 25 and March 4, 2003, and forwarded a recommendation to the County Council; and

WHEREAS, the County Council held a public hearing on July 9, 2003, continued to July 30, August 13, and September 10, 2003, to consider the entire record and hear public testimony on Ordinance 03-063, adopting revisions to the Arlington UGA; and

WHEREAS, the County Council approved Amended Ordinance 03-063 on September 10, 2003; and

WHEREAS, the County Executive vetoed Amended Ordinance 03-063 on September 26, 2003; and

WHEREAS, the County Council overrode the veto by a vote of 4-1 and adopted Amended Ordinance 03-063 on October 22, 2003; and

WHEREAS, 1000 Friends of Washington, the Washington Department of Community, Trade and Economic Development, and The Stillaguamish Flood Control District appealed Amended Ordinance 03-063 to the Central Puget Sound Growth Management Hearings Board (CPSGMHB) in Case No. 03-3-0019c; and

WHEREAS, the CPSGMHB issued its Final Decision and Order on March 22, 2004, finding that the County's action did not comply with the GMA and invalidating Amended Ordinance 03-063, and setting a deadline of May 24, 2004, for the County to take legislative action to comply with the Final Decision and Order; and

WHEREAS, Section 6 of Amended Ordinance 03-063 contained a severability clause that provided "if any provision of this ordinance is held invalid or unconstitutional, then the provision in effect prior to the effective date of this ordinance shall be in full force and effect for that individual provision as if this ordinance had never been adopted"; and

WHEREAS, the County, the City of Arlington, and the proponent Dwayne Lane appealed the CPSGMHB's Final Decision and Order to Snohomish County Superior Court; and

WHEREAS, the County wishes to comply with the CPSGMHB's Final Decision and Order in a manner that will make its Superior Court appeal unnecessary; and

WHEREAS, the County has received a new analysis supporting the expansion of the Arlington UGA boundaries to include large parcels that have high visibility for commercial use and that will provide additional employment capacity; and

WHEREAS, the County has considered reasonable measures as they relate to large commercial properties that have high visibility and found none applicable; and

WHEREAS, the County Council held a public hearing on May 19, 2004, continued to May 24, 2004, to consider the entire record and hear public testimony on Emergency Ordinance 04-057, adopting revisions to the Arlington UGA; and

WHEREAS, pursuant to Section 30.73.090 of the Snohomish County Code, the County Council finds that the adoption of this ordinance is necessary for the immediate preservation of public peace and safety, and for the support of county government and its existing public institutions; and

NOW, THEREFORE, BE IT ORDAINED:

Section 1: The County Council makes the following findings of fact and conclusions:

A. The County Council hereby adopts and incorporates by reference the findings and conclusions adopted and the legislative records developed in adopting Amended Ordinance 94-120, Amended Ordinance 94-125, Ordinance 97-076, and Emergency Ordinance 01-047.

B. The proposal by Dwayne Lane to amend the FLU map of the GPP to expand the Arlington UGA to include 110.5 acres to be redesignated from Riverway Commercial Farmland and Rural Freeway Service to Urban Commercial and rezone 110.5 acres from Rural Freeway Service and Agriculture-10 Acres to General Commercial more closely meets the policies of the GPP than the existing plan designation based on the planning commission's following findings of fact and conclusions:

    1. When Dwayne Lane purchased the subject property, the General Policy Plan designation was Urban Commercial.

2. Water and sanitary sewer lines running along the west side of Smokey Point Boulevard are available adjacent to the subject property. This system is owned by the City of Arlington which has invested in utilities in the area because it believes the area is "destined for more intense urban development."
3. The Island Crossing freeway interchange currently supports commercial uses.
4. The subject property is adjacent to Interstate-5, SR 530, and Smokey Point Boulevard.
5. The permit process for commercial projects requires higher development standards for critical areas than is the case for development on agricultural lands. The 150 foot buffer requirements associated with new commercial development will better preserve Portage Creek.
6. Ragnar soils are the best soils for production of commercial crops and there are no Ragnar soils at Island Crossing. The Island Crossing area consists primarily of Puget soils that are adequate for hay, green chop and pasture, but are not suitable for more valuable crops like berries and corn. The Puget soils are considered "prime" only when artificially drained, which the land at the site is not, and even when drained the Puget series is considered of low productivity.
7. Farming is no longer financially viable at Island Crossing. Busy highways, high assessed value, small parcel size and safety issues eliminate the viability of the Island Crossing Interchange site as agricultural land.
8. Snohomish County is growing rapidly and it is inevitable that sites like Island Crossing will be converted from agricultural uses to commercial uses.
9. The Commission has concerns about the history of floods in this area and the associated impacts. However, the Commission believes that the impacts can be mitigated as is clearly shown in the DSEIS.
10. The Commission also has concerns about traffic impacts at Island Crossing as a result of future urban development. The Commission believes that the impacts can be mitigated. The DSEIS shows that traffic impacts can be fully mitigated.

C. The proposed expansion to the Arlington UGA is consistent with GPP Policies LU 1.A.3 and LU 2.C.3, which require that new development within UGAs are provided with adequate infrastructure and services, including sanitary sewers.

D. The County has received a new analysis prepared by the Higa Burkholder Associates, LLC, ("Buildable Lands Report 2003 Update, City of Arlington UGA", County Council Exhibit 12) that analyzes commercial and industrial land capacity in

the Arlington UGA, and that also analyzes the availability of large parcels of commercial or industrial lands that have high visibility for commercial uses. This analysis shows a deficiency of parcels or aggregations of parcels of 20 acres or greater within the Arlington UGA that have high visibility for commercial uses, and that have traffic access to Interstate 5. This analysis also includes a refined analysis of employment capacity in the Arlington UGA, and identifies and corrects certain errors regarding parcel potential for development that were contained within the County's Final Buildable Lands Report, adopted by Motion 03-080 in January 2003. The City of Arlington has adopted this report in their Resolution 679 of May 17, 2004. See Exhibit 13. Part IV(A) of Exhibit 12 shows a deficiency of parcels or aggregations of parcels of 20 acres or greater within the Arlington UGA that have high visibility for commercial uses, and that have traffic access to Interstate 5. Part IV(B) of Exhibit 12 argues that the Arlington UGA has possibly consumed 50% or more of the employment land it had available in 1990. The Snohomish County Department of Planning and Community Development has expressed discomfort with the reliability of the employment data upon which the analysis of Part IV(B) is based. Therefore the County Council adopts the report of Exhibit 12 pursuant to UG-14(d) and RCW 36.70A.110, except for the employment data used in Part IV(B) thereof and the conclusions that depend upon this data, and relies upon this adopted analysis in the formulation of its findings and conclusions herein. From this analysis the Council concludes the Arlington UGA experiences a deficiency of larger parcels within that UGA to accommodate the remaining commercial or industrial growth projected for that UGA

E. The proposed expansion of the Arlington UGA is consistent with County-wide Planning Policy UG-14.d.4, which provides for UGA expansion "to include additional commercial or industrial land if the expansion is based on an assessment that concludes there is a deficiency of larger parcels within that UGA to accommodate the remaining commercial or industrial growth projected for that UGA" and which also takes into account characteristics relevant to the assessment of the adequacy of the remaining commercial or industrial land base.

F. The proposed expansion of the Arlington UGA is consistent with GPP Policy LU 1.A.9, which provides for UGA expansion "to include additional commercial or industrial land capacity if the expansion is based on an assessment that concludes there is a deficiency of larger parcels within that UGA to accommodate the remaining commercial or industrial growth projected for that UGA" and which also takes into account characteristics relevant to the assessment of the adequacy of the remaining commercial or industrial land base.

G. The County Council has considered reasonable measures adopted as an appendix to the County-wide Planning Policies and has concluded that no reasonable measures could be applied to the Arlington UGA that could be taken to increase

commercial or industrial capacity of larger parcels without expanding the boundaries of the UGA.

H. The proposed area-wide rezone (Exhibit C, Map 7a) is consistent with the following initial criteria for rezone requests in SCC 30.74.040:
   1. Where applicable, the proposed rezones are necessary because an amendment to the future land use map of the GPP has also been proposed that meets the initial evaluation criteria listed in SCC 30.74.030.
   2. Public facilities and services necessary for development are available or programmed to be provided to the sites of the proposed rezones, consistent with the GMA comprehensive plan or development regulations as determined by applicable service providers.
   3. The proposed rezones do not require a concurrent site plan approval because there is an absence of special site conditions and applicable GPP or subarea policies.

I. The proposed area-wide rezone (Exhibit C, Map 7a) is consistent with the GMA comprehensive plan and consistent with the provisions of the GMA.

J. The County Council concludes that the proposed area-wide rezone (Exhibit C, Map 7a) implements the county's GMA comprehensive plan.

K. The County Council concludes that the proposed area-wide rezone (Exhibit C, Map 7a) bears a substantial relationship to the public health, safety and welfare.

L. The proposed UGA amendment is consistent with the following final review and evaluation criteria of SCC 30.74.060:
   1. The proposed amendment maintains consistency with other elements of the GMA comprehensive plan;
   2. All applicable elements of the GMA comprehensive plan support the proposed amendment;
   3. The proposed amendment meets the goals, objectives, and policies of the GMA comprehensive plan as discussed in the specific findings; and
   4. The proposed UGA amendment is consistent with the countywide planning policies.

M. The amendment to the GMA comprehensive plan satisfies the procedural and substantive provisions of and is consistent with the GMA.

N. The amendment maintains the GMA comprehensive plan's consistency with the multi-county policies adopted by the Puget Sound Regional Council and with the countywide planning policies for Snohomish County.

O. Cities have been notified and consulted with regarding proposed amendments that affect UGAs or GPP FLU map designations within UGAs.

P. There has been early and continuous public participation in the review of the proposed amendments.

Q. A Draft Supplemental Environmental Impact Statement (DSEIS) was issued on February 19, 2003, for the Dwayne Lane proposal. A Final SEIS, including response to comments on the DSEIS, was prepared following the 30-day comment period and was issued on July 1, 2003. The purpose of the SEIS was to analyze potential significant adverse environmental impacts of the proposals and any alternatives that were not previously identified in the two EIS documents and a series of addenda prepared for the Snohomish County GMA Comprehensive Plan – General Policy Plan and Transportation Element between 1994 and 2003.

R. The County Council finds that the amendments adopted by this ordinance fall within the range of alternatives studied in the SEIS and are within the scope of analysis contained in the SEIS and associated adopted environmental documents and result in no new significant adverse environmental impacts. The SEIS performs the function of keeping the public apprised of the refinement of the original GMA comprehensive plan proposal by adding new information, but does not substantially change the analysis of significant impacts and alternatives analyzed in the existing adopted environmental documents.

S. The SEPA requirements with respect to this proposed action have been satisfied by these documents.

T. The County Council held a public hearing on July 9, 2003, continued to July 30, August 13, and September 10, 2003, to consider the Planning Commission's recommendations.

U. The County Council held a public hearing on May 19, 2004, to consider new information regarding this proposal.

V. The public was notified of the public hearings held by the Planning Commission and the County Council by means of published legal notices in The (Everett) Herald and local newspapers.

W. The proposal has been broadly disseminated and opportunities have been provided for written comments and public hearing after effective notice.

X. Approval of the Island Crossing Interchange Docket Proposal is not precedent for redesignation of Agricultural land in the Stillaguamish Valley. This proposal is approved entirely on its own merits. These include:

(1) This proposal is supported by the Snohomish County Planning Commission.
(2) Bringing this land into the Arlington Urban Growth Area is fully supported by the City of Arlington.
(3) This proposal is supported by the Stillaguamish Tribe.
(4) This land is located at an I-5 interchange between an interstate highway and a state highway, and is uniquely located for commercial needs of the area.
(5) This land has unique access to utilities. Redesignation of adjacent properties to the east will not occur because utilities are unavailable to the east.
(6) This land is already characterized by urban development. Infrastructure already present includes water & sewer and three urban highways: I-5, SR 530, and Smoky Point Boulevard. Commercial establishments already present include one hotel, 4 restaurants, 5 gas stations, a smokeshop and a fireworks retail store, and a methadone treatment facility.
(7) The 5/19/04 hearing testimony of John Henken shows that the fallow farmland there is not taxed as agricultural land.
(8) The 5/19/04 hearing testimony of Duke Otter and Orin Barlond shows that there are 22 to 30 existing grandfathered legal lots in the proposal area that are not constrained by the current A-10 zoning and which can be developed at a density at or near urban density.

Y. The land contained within the Island Crossing Interchange Docket Proposal is not agricultural land of long term commercial significance. Although some of the soils may be of a type appropriate for agricultural use, soil type is only one factor among many others in the legal test for agricultural land of long term commercial significance. The County Council has addressed the question as to whether the land is:

> "primarily devoted to the commercial production of agricultural products and has long-term commercial significance for agricultural production"

and has found that it is not.

At the public hearing, of May 19, 2004, the testimony of Mrs. Roberta Winter amplified on her previous testimony and resubmitted her earlier letter (Exh. 111) as hearing Exhibit 8. Mrs. Winters was very persuasive on this point that she and her husband and family loved their farm and their rural life and made every effort to make the farm prosper, but were unable due to various factors beyond their control, including in no small part the pressure of encroaching urbanization. Since the mid-

1950's, she and her husband had a dairy farm in the very location of the Island Crossing Interchange Docket Proposal site. Locating and then expanding I-5 put them out of the dairy business. They soon discovered that crops generated less revenue than the property taxes. The Winters sold the land because the land could not be profitably farmed.

Council finds that this land cannot be profitably farmed, and is not agricultural land of long term commercial significance.

Z. The Island Crossing Interchange Docket Proposal site has episodically flooded in the past and will continue to episodically flood in the future, whether or not the proposal is approved, and whether or not the site is developed. The relevant question is not whether the proposal site experiences floods, but rather does the site experience significant adverse flood impacts which cannot be reasonably mitigated.

The Draft Supplemental Environmental Impact Statement (Exh. 22) clearly states, at p. 2-24:

> Assuming effective implementation of applicable regulations and recommended mitigation measures, no significant unavoidable adverse surface water quantity or quality impacts would be anticipated associated with the future development of the site.

In addition, Mrs. Roberta Winter testified at the May 19, 2004 hearing that during her years on the farm the property never flooded, except for the 1990 flood, and even that flood never reached her house, was only 2 to 4 inches deep except in the natural drainage areas, and receded as fast as it rose. See Exhibit 8.

AA. In Exh. 135, applicant of the Island Crossing Interchange Docket Proposal states various development techniques and plans which will be voluntarily used to minimize the prospect of flood impacts. These techniques include the following:

- Excavation to create additional storage.
- Building pads and access roads will only be filled to the 100-year floodplain level.
- Minimize the amount of fill brought on-site.
- Most fill will be excavated onsite.
- Water passage to South Slough and Portage Creek will remain unimpeded.
- Parking lots will be built below Base Flood Elevation.
- Parking lots may be built of permeable surface.
- Impermeable surface will be minimized.

Section 2. The County Council bases its findings of facts and conclusions on the entire record of testimony and exhibits, including all written and oral testimony before the planning commission and county council.

Section 3. The County Council hereby amends Amended Ordinance 94-120 as adopted on June 28, 1995, last amended by Emergency Ordinance 01-047 as adopted on July 23, 2001, to modify Exhibits A and C which were therein incorporated. The County Council hereby adopts two new exhibits for Amended Emergency Ordinance 01-047: (1) Exhibit A, Map 7 ("Proposed Comprehensive Plan Amendment, Dwayne Lane") which is a map that depicts the modified UGA boundary for the Arlington UGA; and (2) Exhibit C which is a county assessor's map that accurately depicts the revised UGA boundary for the Arlington UGA. Exhibits A and C are attached hereto and incorporated herein by this reference. After the effective date of Emergency Ord. 04-057, development in the Island Crossing Interchange Docket Proposal area added to the Arlington UGA by Emergency Ord. 04-057 should be conditioned upon use of the flood protection measures outlined above in finding AA of Section 1, provided such flood protection measures are technically feasible and do not defeat the purpose of the development.

Section 4. Based on the foregoing findings and conclusions, the Snohomish County GMA Comprehensive Plan Future Land Use Map adopted as Map 4 of Exhibit A in Section 4 of Amended Ordinance No. 94-125 on June 28, 1995, and last amended by Ordinance No. 03-001 on January 27, 2003, is amended as depicted in Exhibit A, Map 7 which is attached hereto and incorporated by reference into this ordinance as if set forth in full.

Section 5. Based on the foregoing findings and conclusions, the County Council hereby adopts the area-wide rezone as mapped in the following documents which are attached hereto and incorporated by reference into this ordinance as if set forth in full:

A. Assessor map showing the rezone incorporated herein as Exhibit C; and

B. Map 7a and incorporated herein as Exhibit B.

Section 6. Severability. If any provision of this ordinance is held invalid or unconstitutional, such invalidity or unconstitutionality shall not affect the validity or constitutionality of the remainder of this ordinance. Provided, however, that if any provision of this ordinance is held invalid or unconstitutional, then the provision in effect prior to the effective date of this ordinance shall be in full force and effect for that individual provision as if this ordinance had never been adopted.

PASSED this 24th day of May, 2004.

SNOHOMISH COUNTY COUNCIL
Snohomish County, Washington

John M Koster
Council Chair

ATTEST:

Sheila McCallister
Asst. Clerk of the County Council

( ) Approved
(X) Emergency
( ) Vetoed

DATE: _____, 2004

_____
~~County Executive~~

ATTEST: _____

Approved as to form only:

_____
Deputy Prosecuting Attorney

APPENDIX E

CENTRAL PUGET SOUND
GROWTH MANAGEMENT HEARINGS BOARD
STATE OF WASHINGTON

1000 FRIENDS OF WASHINGTON, STILLAGUAMISH FLOOD CONTROL DISTRICT, AGRICULTURE FOR TOMORROW, PILCHUCK AUDUBON SOCIETY; and THE DIRECTOR OF THE STATE OF WASHINGTON DEPARTMENT OF COMMUNITY, TRADE AND ECONOMIC DEVELOPMENT, Petitioners, v. SNOHOMISH COUNTY, Respondent, and DWAYNE LANE, Intervenor.	**Case No. 03-3-0019c** **[*Island Crossing*]** **ORDER FINDING CONTINUING NONCOMPLIANCE AND CONTINUING INVALIDITY** **and** **RECOMMENDATION FOR GUBERNATORIAL SANCTIONS**

I. SYNOPSIS

On March 22, 2004, the Central Puget Sound Growth Management Hearings Board issued a Final Decision and Order (the **FDO**) in Case No. 03-3-0019c, finding that Snohomish County's comprehensive plan and development regulations for the Island Crossing Area did not comply with the goals and requirements of the Growth Management Act (the **GMA**). The FDO entered findings of noncompliance and invalidity for Snohomish County Ordinance No. 03-063 and remanded the matter to the County for subsequent amendments to achieve compliance with the GMA.

On May 24, 2004, the County passed Ordinance No. 04-057 in response to the FDO, re-adopting the same plan and development regulations that the Board had found noncompliant and invalid in Ordinance No. 03-063. At the compliance hearing, the burden was on the County to demonstrate that its actions removed substantial interference with the goals of the Act and merited a rescission of the determination of invalidity.

The County argued that new information justified the County's action again removing agricultural resource land designations, designating the entire Island Crossing area for commercial uses and including the area within the Arlington urban growth area. Arguing in support of the County was Intervenor Dwayne Lane (**Lane**), a landowner in Island Crossing who wishes to re-locate his automobile dealership there. In opposition were petitioners 1000 Friends of Washington (**1000 Friends**), the Stillaguamish Flood Control District (the **SFCD**), and the Washington State Department of Community, Trade and Economic Development (**CTED**), acting on behalf of and at the direction of Governor Gary Locke.

The Board agreed with petitioners that the County's "new information" did not cure the defects of Ordinance No. 03-063 and therefore found that Ordinance No. 04-057 does not comply with the goals and requirements of the GMA regarding resource lands and urban growth areas. The Board entered a finding of continuing noncompliance and invalidity for the Snohomish County comprehensive plan and development regulation provisions for Island Crossing.

The Board noted that this is the third time that Snohomish County has attempted to convert agricultural land at Island Crossing into the Arlington urban growth area, notwithstanding consistent contrary readings of the law by the Snohomish County SEPA Responsible Official, Snohomish County Executive, the Growth Management Hearings Board, Snohomish County Superior Court, the First Division of the Washington State Court of Appeals, and the Governor of the State of Washington. The Board recommended to Governor Locke that he impose financial sanctions until and unless Snohomish County provides assurance that it will take no legislative action contrary to the Board's interpretation of the GMA in this matter unless those holdings are subsequently reversed by a court of competent jurisdiction.

II. PROCEDURAL BACKGROUND

A. Case History Preceding Final Decision and Order

On March 22, 2004, the Central Puget Sound Growth Management Hearings Board (the **Board**) entered a Final Decision and Order (the **FDO**) in the above captioned case finding that Snohomish County Ordinance No. 03-063 was in noncompliance with RCW 36.70A.020(1), (2), (8), and (10) and .040, .060(1), .110, .170(1)(a) and .215, and entered a finding of invalidity with respect to the zoning and plan amendments wrought by adoption of Ordinance No. 03-063. The portion of the procedural history of this case that preceded issuance of the FDO appears in Appendix A.

B. Compliance Phase History

On March 30, 2004, the Board received "Snohomish County's Motion for Determination of Validity Pursuant to RCW 36.70A.302(4)" (the **County's Motion**).

On March 31, 2004, the Board issued a "Notice of Corrected Final Decision and Order" which listed a number of corrections to the FDO and attached a "Corrected FDO" (the **Corrected FDO**).

On April 9, 2004, in response to the County's Motion, the Board issued "Order Rescinding Findings of Noncompliance and Invalidity" (the **Board's April 9, 2004 Order Rescinding Findings of Noncompliance and Invalidity**).

On May 26, 2004, the Board received "Petitioners' Request for Permission to File a Motion after Motion Deadline/Motion to Rescind Finding of Compliance and to Reinstate Invalidity" (**Petitioners' May 26, 2004 Pleading**). Attached to Petitioners' May 26, 2004 Pleading was a copy of Snohomish County "Amended Emergency Ordinance No. 04-057" (**Ordinance No. 04-057**.)

On May 27, 2004, the Board received a letter from Andrew S. Lane, counsel for Snohomish County, opposing the Petitioners' May 26, 2004 Pleading.

On May 28, 2004, the Board issued "Order on Petitioners' Request and Notice Regarding Compliance Hearing" (the **Board's May 28, 2004 Order**). The Board's May 28, 2004 Order granted leave for 1000 Friends to file "Petitioners' Motion to Rescind Finding of Compliance and to Reinstate Invalidity" (the **Petitioners' Motion**) and provided that any interested party could, at its option, submit a Response Brief to Petitioners' Motion by noon on June 1, 2004. The Board's May 28, 2004 Order also changed the start time of the Compliance Hearing to 1:30 p.m. on Monday, June 14, 2004.

After the issuance of the Board's May 28, 2004 Order, the Board received the following: correspondence from Henry E. Lippek, counsel for the Stillaguamish Flood Control District; a letter from Andrew S. Lane, (signed by Millie Judge), counsel for Snohomish County; and two letters from Todd C. Nichols, counsel for Intervenor Dwayne Lane.

No Response pleadings were received by the deadline set forth in the Board's May 28, 2004 Order.

On June 1, 2004, the Board issued "Order Rescinding the April 9, 2004 Order Rescinding Findings of Noncompliance and Invalidity."

On June 2, 2004, the Board received Snohomish County's Statement of Actions Taken to Comply" (the **SATC**) with attached exhibits, including a copy of Amended Ordinance No. 04-057.

On June 9, 2004, the Board received "Intervenor Lane's Response to Snohomish County's Statement of Actions Taken to Comply and Statement of Authorities" (the

Lane Response); "CTED's Response to Snohomish County's Statement of Actions Taken to Comply" (the **CTED Response**); "Petitioners' Response to Snohomish County's Statement of Actions Taken to Comply" (the **1000 Friends Response**); and "Flood District's Response to Snohomish County's Statement of Actions Taken to Comply" (the **SFCD Response**) with attached exhibits.

The Board conducted the compliance hearing in this matter on June 14, 2004 beginning at 1:30 p.m. in the conference center on the fifth floor of the Bank of California Building, 900 Fourth Avenue, in Seattle. Present for the Board were members Edward G. McGuire, Bruce C. Laing, and Joseph W. Tovar, presiding officer. Representing the parties were the following: for the County were Andrew S. Lane and Shawn Aronow; for Intervenor Dwayne Lane was Todd C. Nichols; for 1000 Friends of Washington was John T. Zilavy; for CTED was Alan D. Copsey; and for the SFCD were Henry E. Lippek and Ashley E. Evans. Court reporting services were provided by J. Gayle Hays, of Byers and Anderson, Inc., Seattle. No witnesses testified. After hearing oral argument from the parties, Mr. Tovar stated that the Board would accept simultaneous post-compliance hearing briefing from the parties on the narrow subject of whether the Board has continuing authority to answer Legal Issue No. 5 as set forth in the Prehearing Order. He stated that such briefing was to be submitted not later than 4:00 p.m. on Thursday, June 17, 2004 and not to exceed 10 pages in length from the combined Petitioners and 10 pages in length from the combined County and Intervenor. After the compliance hearing, a transcript was ordered (the **Transcript**).

On June 17, 2004, the Board received "Intervenor Lane's and Respondent Snohomish County's Joint Memorandum of Authorities Regarding Critical Areas Compliance" (the **Lane/Snohomish Brief Re: Legal Issue 5**) and "Petitioners' Joint Brief Re: The Board's Jurisdiction to Address Issue 5 (Critical Areas)" (the **Petitioners Brief Re: Legal Issue 5**).

III. FINDINGS OF FACT

1. The FDO specifically identified the invalidated portions of Ordinance No. 03-063 as:

   - The portion that expanded the Arlington urban growth area by 110.5 acres to include the Island Crossing area.
   - The portion that replaced the 75.5 acre area of Riverway Commercial Farmland designation with an Urban Commercial designation
   - The portion that rezoned the 75.5 acres of A-10 to General Commercial (GC)
   - The portion that replaced the 35.5 acre area of Rural Freeway Service with an Urban Commercial designation
   - The portion that rezoned the 35.5 acres of Rural Freeway Service (RFS) to General Commercial

   FDO, at 40-41.

2. Snohomish County adopted Ordinance No. 04-057 on May 24, 2004. SATC, Attachment 1.
3. The title caption of Ordinance No. 04-057 reads: "RELATING TO GROWTH MANAGEMENT; REVISING THE EXISTING URBAN GROWTH AREA FOR THE CITY OF ARLINGTON; ADOPTING MAP AMENDMENTS TO THE GROWTH MANAGEMENT ACT COMPREHENSIVE PLAN; AND ADOPTING COUNTY-INITIATED AREA-WIDE REZONES PURSUANT TO CHAPTER 30.74 SCC; AND AMENDING AMENDED ORDINANCE 94-125, ORDINANCE 94-120, AND EMERGENCY ORDINANCE 01-047."
Id.

4. Among the County Council's findings of fact and conclusions listed in Section 1 of Ordinance No. 04-057 are the following:

> B. The proposal by Dwayne Lane to amend the FLU map of the GPP to expand the Arlington UGA to include 110.5 acres to be redesignated from Riverway Commercial Farmland and Rural Freeway Service to Urban Commercial and rezone 110.5 acres from Rural Freeway Service and Agriculture-10 Acres to General Commercial more closely meets the policies of the GPP than the existing plan designation based on the planning commissioner's following findings of facts and conclusions:
>
> 1. When Dwayne Lane purchased the subject property, the General Policy Plan designation was Urban Commercial.
>
> . . . .
>
> 6. Ragnar soils are the best soils for production of commercial crops and there are no Ragnar soils at Island Crossing. The Island Crossing area consists primarily of Puget soils that are adequate for hay, green chop and pasture, but are not suitable for more valuable crops like berries and corn. The Puget soils are considered "prime" only when artificially drained, which the land at the site is not, and even when drained the Puget series is considered low productivity.
>
> 7. Farming is no longer financially viable at Island Crossing. Busy highways, high assessed value, small parcel size and safety issues eliminate the viability of the Island Crossing interchange site as agricultural land.
>
> 8. Snohomish County is growing rapidly and it is inevitable that sites like Island Crossing will be converted from agricultural uses to commercial uses.
>
> 9. The Commission has concerns about the history of floods in this area and the associated impacts. However, the Commission believes that the impacts can be mitigated as is clearly shown in the DSEIS.

D. The County has received a new analysis prepared by the Higa Burkholder Associates, LLC, ("Buildable Lands Report 2003 Update, City of Arlington UGA", County Council Exhibit 12) that analyzes commercial and industrial land capacity in the Arlington UGA, and that also analyzes the availability of large parcels of commercial or industrial lands that have high visibility for commercial uses. From this analysis the Council concludes the Arlington UGA experiences a deficiency of larger parcels within that UGA to accommodate the remaining commercial or industrial growth projected for that UGA.

. . . .

X. Approval of the Island Crossing Interchange Docket Proposal is not precedent for redesignation of Agricultural land in the Stillaguamish Valley . . .

Y. The land contained within the Island Crossing Interchange Docket Proposal is not agricultural land of long term commercial significance . . . Council finds that this land cannot be profitably farmed, and is not agricultural land of long term commercial significance.

Z. The Island Crossing Interchange Docket Proposal site has episodically flooded in the past and will continue to episodically flood in the future, whether or not the site is developed. The relevant question is not whether the proposal site experiences floods, but rather does the site experience significant adverse flood impacts which cannot be reasonably mitigated . .

AA. In Ex. 135, applicant of the Island Crossing Interchange Docket Proposal states various development techniques and plans which will be voluntarily used to minimize the prospect of flood impacts ...

5. Section 3 of Ordinance No. 04-057 provides, in part:

> After the effective date of Emergency Ord. 04-057, development in the Island Crossing Interchange Docket Proposal area added to the Arlington UGA by Emergency Ord. 04-057 should be conditioned upon use of the flood protection measures outlined above in finding AA of Section 1, provided such flood protection measures are technically feasible and do not defeat the purpose of the development.

Id.

6. The substance of the amendments created by Ordinance No. 04-057 are identical to those created by Ordinance No. 03-063. Transcript, at 18.

7. The Island Crossing area is located within the floodplain of the Stillaguamish River. Planning and Development Services (**PDS**) Report, at 10. FDO, Findings of Fact, at 9-10.

8. The Stillaguamish River basin suffers from damaging floods on average every three to five years according to the Federal Emergency Management Agency. PDS Report, at 11. *Id.*

9. The 110.5 acre area subject to Ordinance No. 03-063 [and Ordinance No. 04-057] is configured as a multi-sided polygon with two roughly mile-long sides that follow north-south right-of-way lines, two smaller but *parallel* east-west sides that do not follow right-of-way lines, and a number of other smaller sides that follow jogs in right-of-way or property lines. DEIS, Figure 1-2, scale map of "Proposed Comprehensive Plan Amendment – Dwayne Lane." *Id.*

10. The two long sides of the 110.5 acre shape are (a) the western side which coincides with the western edge of the Interstate 5 right-of way for approximately 5,900 linear feet; and (b) the eastern side of approximately 5,000 linear feet, of which roughly the southerly 4,300 feet coincide with the eastern edge of the Smokey Point Boulevard right-of-way. The two parallel sides of this shape are (a) the northerly edge which is approximately 2,700 linear feet and coincides with the northern edge of parcels which front onto S.R. 530; and (b) the southern side, which is roughly 450 linear feet long, and lies entirely within public right-of-way. *Id.*

11. The southerly 700 feet of the 110.5 acre shape (*i.e.*, that portion which lies south of 200th Street NE, if extended) is entirely within either Interstate 5 right-of-way or Smokey Point Boulevard right-of-way. *Id.*

12. The City of Arlington city limits abut the southern edge of the 110.5 acre shape. *Id.*

13. The closest point of contact between Arlington's city limits and private property within the 110.5 acre shape is approximately 700 feet. *Id.*

14. The Island Crossing Area is designated floodway fringe by the County's flood hazard regulations. PDS Report, at 14. *Id.*

15. With the exception of the cities of Stanwood and Arlington, the flood plain of the main fork of the Stillaguamish River is designated on the County's Future Land Use Map as Agricultural Resource Land. Snohomish County General Policy Plan, Future Land Use Map, dated May 24, 2004, posted online at http://www.co.snohomish.wa.us/pds/905-GIS/maps/flu/flu117.pdf .

16. The agricultural resource industry in the Stillaguamish River Valley includes Twin City Foods, Inc. of Stanwood Washington. SFCD Response, Ex. 6.

17. Lands in the "Island Crossing triangle" have historically and are currently being contracted to provide crops for processing by Twin City Foods. *Id.*

18. While the "Island Crossing triangle" is within the flood plain of the Stillaguamish River, the existing Arlington UGA to the south sits on higher ground above the flood plain. Transcript, at 45.

IV. Legal Issue No. 5 regarding the GMA's Critical Areas Provisions

In the FDO, the Board did not reach Legal Issue No.5 which alleged noncompliance with RCW 36.70A.170(1)(d) and RCW 36.70A.060(2).[1] Legal Issue No. 5 is:

> ***By expanding the Arlington UGA into a frequently flooded area and by redesignating lands within that area for commercial use, is Snohomish County Amended Ordinance No. 03-063 in noncompliance with RCW 36.70A.060 and RCW 36.70A.170?***

During the compliance phase of this case, Petitioners asked that the Board now answer Legal Issue No. 5 as it applies to Ordinance No. 04-057. CTED Response, at 19. In post-compliance hearing briefing, the parties argued whether the Board retains jurisdiction to answer Legal Issue No. 5 in a compliance proceeding.

While both sides present cogent arguments, the most compelling is the argument that the Petitioners did not avail themselves of the opportunity to file a post-FDO motion specifically requesting that the Board also address Legal Issue No. 5. Lane/Snohomish Brief Re: Legal Issue 5, at 2. Had Petitioners done so, the Board clearly would have had jurisdiction to answer Legal Issue No. 5 in the context of clarifying or reconsidering the FDO. The Board concludes that it lacks authority to answer Legal Issue No. 5 during the compliance phase of this proceeding.

While the Board will not address as a separate legal claim the issue of compliance of Ordinance No. 04-057 with the GMA's critical areas provisions, facts presented in that context regarding the area's environmental attributes do shed light on the analysis of issues which remain before the Board. Therefore, the Board will take note, as appropriate, of those environmental factors in the analysis, *infra.*

V. APPLICABLE LAW AND PLEADINGS OF THE PARTIES

A. Noncompliance, Invalidity and Sanctions

Once the Board finds a jurisdiction is not in compliance with the GMA and remands the matter back to the jurisdiction, the Board must specify the compliance period in its FDO. RCW 36.70A.300. The Act prescribes a limited period to achieve compliance; it provides in relevant part:

> [In the FDO], [t]he board shall specify a reasonable time not in excess of one hundred eighty days, or such longer period as determined by the board

[1] The FDO stated: "The Board concludes that because it found, *supra*, that Ordinance No. 03-063 is noncompliant with the agricultural conservation and urban growth area provisions of the GMA, and remanded the Ordinance to the County, it need not and does not reach the question of whether the Ordinance fails to comply with RCW 36.70A.170(1)(d) and RCW 36.70A.060(2)." FDO, at 38.

> in cases of unusual scope or complexity, within which the . . . city shall comply with the requirements of this chapter.

RCW 36.70A.300(3)(b).

In the Board's FDO, May 24, 2004 was established as the compliance date by which Snohomish County was required to take legislative action to achieve compliance with the goals and requirements of the Act. FDO, at 40.

RCW 36.70A.330 provides, in relevant part:

> (1) After the time set for complying with the requirements of this chapter under RCW 36.70A.300(3)(b) has expired, or at an earlier time upon the motion of a . . . county or city subject to a determination of invalidity under RCW 36.70A.300 [now RCW 36.70A.302], the board shall set a hearing for the purpose of determining whether the . . . city is in compliance with the requirements of this chapter.
> (2) The board shall conduct a hearing and issue a finding of compliance or noncompliance with the requirements of this chapter and with any compliance schedule established by the board in its final order. . . .
> (3) If the board after a compliance hearing finds that the . . . county or city is not in compliance, the board shall transmit its finding to the Governor. The board may recommend to the Governor that the sanctions authorized by this chapter be imposed. The board shall take into consideration the . . . county's or city's efforts to meet its compliance schedule in making the decision to recommend sanctions to the Governor.

The Board remanded the matter with direction to Snohomish County to take appropriate legislative action. Snohomish in its SATC points to Ordinance No. 04-057 as its action taken to comply with the FDO. Because the Board found that Snohomish County's prior action was not only noncompliant, but also invalid, Snohomish bears the burden of proof:

> A county or city subject to a determination of invalidity made under RCW 36.70A.300 or 36.70A.302 has the burden of demonstrating that the ordinance or resolution it has enacted in response to the determination of invalidity will no longer substantially interfere with the fulfillment of the goals of this chapter under the standard of RCW 36.70A.302(1).

RCW 36.70A.320(4).

RCW 36.70A.340 provides:

> Upon receipt from the board of a finding that a state agency, county, or city is in noncompliance under RCW 36.70A.330, or as a result of failure to meet the requirements of RCW 36.70A.210, the governor may either:

(1) Notify and direct the director of the office of financial management to revise allotments in appropriation levels;

(2) Notify and direct the state treasurer to withhold the portion of revenues to which the county or city is entitled under one or more of the following: The motor vehicle fuel tax, as provided in chapter 82.36 RCW; the transportation improvement account, as provided in RCW 47.26.084; the urban arterial trust account, as provided in RCW 47.26.080; the rural arterial trust account, as provided in RCW 36.79.150; the sales and use tax, as provided in chapter 82.14 RCW; the liquor profit tax, as provided in RCW 66.08.190; and the liquor excise tax, as provided in RCW 82.08.170; or

(3) File a notice of noncompliance with the secretary of state and the county or city, which shall temporarily rescind the county or city's authority to collect the real estate excise tax under RCW 82.46.030 until the governor files a notice rescinding the notice of noncompliance.

B. Substantive Requirements and Goals of the Act

1. GMA Provisions concerning Agricultural Resource Lands

RCW 36.70A.020 provides in relevant part:

(2) Reduce sprawl. Reduce the inappropriate conversion of undeveloped land into sprawling, low-density development.

. . . .

(8) Natural resource industries. Maintain and enhance natural resource-based industries, including productive timber, agricultural, and fisheries industries. Encourage the conservation of productive forest lands and productive agricultural lands, and discourage incompatible uses.

RCW 36.70A.040 provides in relevant part:

(1) Each county that has both a population of fifty thousand or more . . . shall conform with all of the requirements of this chapter.

. . . .

(3) Any county or city that is initially required to conform with all of the requirements of this chapter under subsection (1) of this section shall take actions under this chapter as follows: (a) The county legislative authority shall adopt a county-wide planning policy under RCW 36.70A.210; (b) the county and each city located within the county shall designate critical areas, agricultural lands, forest lands, and mineral resource lands, and adopt development regulations conserving these designated agricultural lands, forest lands, and mineral resource lands and protecting these designated critical areas, under RCW 36.70A.170 and 36.70A.060; (c) the

county shall designate and take other actions related to urban growth areas under RCW 36.70A.110; . . .

Emphasis added.

RCW 36.70A.050 provides in relevant part:

> (1) Subject to the definitions provided in RCW 36.70A.030, the department shall adopt guidelines, under chapter 34.05 RCW, no later than September 1, 1990, to guide the classification of: (a) Agricultural lands; (b) forest lands; (c) mineral resource lands; and (d) critical areas. The department shall consult with the department of agriculture regarding guidelines for agricultural lands, the department of natural resources regarding forest lands and mineral resource lands, and the department of ecology regarding critical areas.
>
> . . . .
>
> (3) The guidelines under subsection (1) of this section shall be minimum guidelines that apply to all jurisdictions, but also shall allow for regional differences that exist in Washington state. The intent of these guidelines is to assist counties and cities in designating the classification of agricultural lands, forest lands, mineral resource lands, and critical areas under RCW 36.70A.170.

Emphasis added.

RCW 36.70A.060 provides in relevant part:

> (1) Each county that is required or chooses to plan under RCW 36.70A.040, and each city within such county, shall adopt development regulations on or before September 1, 1991, to assure the conservation of agricultural, forest, and mineral resource lands designated under RCW 36.70A.170. . . .

RCW 36.70A.170 provides in relevant part:

> (1) On or before September 1, 1991, each county, and each city, shall designate where appropriate:
>
> (a) Agricultural lands that are not already characterized by urban growth and that have long-term significance for commercial production of food or other agricultural products;

Emphasis added.

Agricultural lands of long term commercial significance (**ALLTCS**) is defined as "the growing capacity, productivity, and soil composition of the land for long-

term commercial production, in consideration with the land's proximity to population areas, and the possibility of more intense uses of the land." RCW 36.70A.030 (10).

2. GMA Provisions regarding Urban Growth Areas

RCW 36.70A.020 provides in relevant part:

> (1) Urban growth. Encourage development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner.
>
> (2) Reduce sprawl. Reduce the inappropriate conversion of undeveloped land into sprawling, low-density development.

RCW 36.70A.110(1) sets forth locational factors which govern the designation of urban growth areas:

> Each county that is required or chooses to plan under RCW 36.70A.040 shall designate an urban growth area or areas within which urban growth shall be encouraged and outside of which growth can occur only if it is not urban in nature. Each city that is located in such a county shall be included within an urban growth area. An urban growth area may include more than a single city. An urban growth area may include territory that is located outside of a city only if such territory already is characterized by urban growth whether or not the urban growth area includes a city, or is adjacent to territory already characterized by urban growth, or is a designated new fully contained community as defined by RCW 36.70A.350

RCW 36.70A.215(1) requires the County and its cities to adopt county-wide planning policies to establish a review and evaluation program – the "buildable lands" report and review. The purpose of the review and evaluation program is to:

> (a) Determine whether a county and its cities are achieving urban densities within urban growth areas by comparing growth and development assumptions, targets, and objectives contained in the county-wide planning policies and the county and city comprehensive plans with actual growth and development that has occurred in the county and its cities; and
>
> (b) Identify reasonable measures, other than adjusting urban growth areas, that will be taken to comply with the requirements of this chapter.

The first evaluation, or "buildable lands report," was to be completed by September 1, 2002. RCW 36.70A.215(2)(b). The evaluation component, described in RCW 36.70A.215(3), is required to:

(a) Determine whether there is sufficient suitable land to accommodate the county-wide population projection established for the county pursuant to RCW 43.62.035 and the subsequent population allocations within the county and between the county and its cities and the requirements of RCW 36.70A.110;

(b) Determine the actual density of housing that has been constructed and the actual amount of land developed for commercial and industrial uses within the urban growth area since the adoption of a comprehensive plan under this chapter or since the last periodic evaluation as required by subsection (1) or this section; and

(c) Based upon the actual density of development as determined under (b) of this subsection, review the commercial, industrial and housing needs by type and density range to determine the amount of land needed for commercial, industrial and housing for the remaining portion of the twenty-year planning period used in the most recently adopted comprehensive plan.

C. Positions of the Parties and Board Analysis

1. Agricultural Resource Lands

a. Positions of the Parties

Snohomish County and Lane

The County states that, in response to the FDO, the County Council conducted a public hearing on May 19, 2004 and debated the new testimony and comments before the public on May 24, 2004. SATC, at 2. The Council "heard from individuals who own agricultural land in Island Crossing, live in or near Island Crossing and have lifelong and current knowledge of Island Crossing." SATC, at 2-3. Oral testimony in support of the proposition that agriculture at Island Crossing does not have long term commercial significance was cited from Roberta Winter, Orin Barlond, John Henken, and John Koster. *Id.* Written and oral testimony in support of the proposition that Island Crossing retains long term commercial significance for agriculture was cited from Robert Grimm, Tristan Klesick, Roger Lervick, Ralph Omlid, Leland Larson. SATC, at 5-6. The County states: "The witnesses that provided testimony in support of farming in this area were less credible in the Council's view, because they spoke of speculative possibilities, rather than the existing market realities testified to by Winters, Barlond, and Henken." SATC, at 7.

The County also asserts that no evidence was presented showing that redesignating Island Crossing would have any negative impact on adjacent agricultural lands. The County argues:

> Although the Board opined that "[i]t is an axiom of land use planning that urban uses at urban densities and intensities inhibit adjacent farm operations," the FDO cited no evidence from the record to support its opinion. There is no evidence to support a conclusion that the buffer created by these highways will not be adequate to avoid negative impacts on adjacent lands.

Id.

Intervenor Lane supports the County's adoption of Ordinance No. 04-057 and adopted the County's SATC by reference. Lane Response, at 2. The balance of the Lane brief cites statutory references, Board and court decisions addressing the standard of review. Lane Response, at 2-9.

CTED, 1000 Friends and SFCD

CTED asserts that the same fatal errors that rendered Ordinance No.03-063 noncompliant and invalid have been repeated in Ordinance No. 04-057. CTED states:

> The County makes the same error it made when it adopted Ordinance 03-063; it treats economic viability as if it were the sole determinant of long-term commercial significance. As we pointed out in our opening brief . . . the economic viability of farming at Island Crossing is but one factor to consider in assessing whether agricultural lands must be designated and conserved under the GMA, especially, as here, where the viability is threatened by adjacent or pending land uses.

CTED Response, at 8, citing CTED Opening Brief, at 39.

CTED points to the GMA definition of "long-term commercial significance" to support its contention that soils conditions and capabilities are the primary determinant and that, other factors, such as proximity to population areas and the possibility of more intense uses of the land, are secondary ones. CTED Response, at 8. It argues that the "procedural criteria" concerning designation of agricultural resource lands[2] are meant to

[2] The Department of Community, Trade, and Economic Development was directed by RCW 36.70A.050 to adopt guidelines to guide the classification of agricultural lands. These provide:

(1) In classifying agricultural lands of long-term significance for the production of food or other agricultural products, counties and cities shall use the land-capability classification system of the United States Department of Agriculture Soil Conservation Service [**SCS**] as defined in Agricultural Handbook No. 210. These eight classes are incorporated by the United States Department of Agriculture [**USDA**] into map units described in published soil surveys. These categories incorporate consideration of the growing capacity, productivity and soil composition of the land. Counties and cities shall also consider the combined effects of proximity to population areas and the possibility of more intense uses of the land as indicated by:

a. The availability of public facilities;
b. Tax status;
c. The availability of public services;

be applied on an area-wide basis for designating such lands, not as a parcel-by-parcel checklist for de-designating land.

1000 Friends discounts the "anecdotal testimony from two additional farmers who each say that he personally wouldn't farm Island Crossing because it would be too expensive or the location of the highways make it too dangerous." 1000 Friends Response, at 2. 1000 Friends argues that the County misunderstands and mischaracterizes its burden in view of the Board's prior finding of invalidity. Petitioner states:

> The County argues that the board may not substitute its judgment for that of the Council on factual matters, or assessing witness credibility. The County states that "the question is whether Council's decision was clearly erroneous, not whether Petitioners or the Board would have decided another way. Both of these statements are incorrect when the SATC is addressing invalidity. The question for the board on compliance is whether it is persuaded by the record that *Emergency Ordinance* 04-057 does not substantially interfere with the goals of the GMA. Petitioners urge that the answer is no.

1000 Friends Response, at 3-4. Footnotes omitted. Emphasis in original.

With respect to the criteria listed at WAC 365-190-050, 1000 Friends points out that "The SATC does not present methodical evidence on any of these criteria. Instead, the SATC presents anecdotal testimony from three farmers . . . [Barlond, Henken, and Winter.]" 1000 Friends Response, at 4. With respect to Mr. Barlond, petitioner states:

> This testimony is not accompanied by any detailed analysis into the economics of farming that lead to a conclusion that no one could make a living farming on Island Crossing. This is not sufficient evidence for the County to meet its burden of establishing that dedesignating Island Crossing no longer should carry a tarnish of invalidity. It is additional anecdotal evidence.

1000 Friends Response, at 5.

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d. Relationship or proximity to urban growth areas;
e. Predominant parcel size;
f. Land use settlement patterns and their compatibility with agricultural practices;
g. Intensity of nearby land uses;
h. History of land development permits issued nearby;
i. Land values under alternative uses; and
j. Proximity to markets.

(2) In defining categories of agricultural lands of long-term commercial significance for agricultural production, counties and cities should consider using the classification of prime and unique farmland soils as mapped by the Soil Conservation Service. If a county or city chooses to not use these categories, the rationale for that decision must be included in its next annual report to the department of community development.

WAC 365-190-050.

Petitioner SFCD disputes the veracity of Finding No. 1 of Ordinance No. 04-057 , which states "When Dwayne Lane purchased the subject property, the GPP designation was Urban Commercial." SFCD Response, at 11. SFCD asserts that when Dwayne Lane purchased his interest in the former site of the Winters farm in 1993, the property was zoned Ag-10. *Id.*[3]

SFCD agrees with other Petitioners that statements by individuals that they are incapable of profitably farming Island Crossing does not indicate a lack of long-term commercial significance. SFCD states:

> [U]nder GMA, it is not permissible to consider prospective economic returns as a primary criterion for redesignating agricultural land because "it will always be financially more lucrative to develop such land for uses more intense than agriculture." *City of Redmond v. Central Puget Sound Growth Management Hearings Board*, 136 Wn.2d 38, 959 P.2d 1091, 1097 (1998).

SFCD Response, at 10.

b. Board Analysis

By the County's admission, the land use plan and zoning designations wrought by Ordinance No. 04-057 are identical to those created by noncompliant and invalid Ordinance No. 03-063. Transcript, at 18. The only remedial action taken by the County on remand from the Board was to place more testimony in its record, both pro and con, regarding the historical or speculative future ability of specific individuals to profitably farm specific parcels within the Island Crossing triangle. The County insists that, notwithstanding soils characteristics, the Council may divine the long-term commercial significance of agricultural lands by weighing the credibility of opposing opinions.

The County and Lane make much of the opinions expressed by Mrs. Winter, Mr. Barlond and Mr. Henken, three individuals whom the County characterizes as knowledgeable about "existing market realities"[4] Mrs. Winter relates her experiences as a dairy farmer before her family sold the property to Dwayne Lane, yet asserted no particular expertise as a real estate or agricultural industry analyst, nor did the County point to any. Nor did she, Mr. Barlond or Mr. Henken address either the criteria listed at WAC 365-190-050 nor the issue of the long-term agricultural significance of the larger pattern of agricultural land of which the Island Crossing triangle is a part, *i.e.*, the Stillaguamish River Valley. With regard to Mr. Henken's remarks, the Board notes that he is a landowner within the Island Crossing triangle. SATC, at 4. Just as the Supreme Court has clarified that "land

[3] SFCD quotes portions of its comments to the County: "On December 15, 1993, Mr. Lane and Mr. Henken jointly purchased the Winter's farm, parcel #31050800301000." *Id.* Neither the County nor Lane disputed this assertion. At the compliance hearing, counsel for Lane stated that he did not know when his client purchased property in the Island Crossing triangle. Transcript, at 24.

[4] SATC, at 7.

owner intent" is not determinative of the "devoted to" prong[5] of resource lands designations, the Board agrees with CTED that "land owner intent" alone cannot be conclusive in determining LTCS.[6]

In the final analysis, however, the relative weight or credibility that the County assigned to the opinions expressed by individuals during the May 19, 2004 hearing, sheds little light on the question of whether agricultural lands at Island Crossing have long-term commercial significance. While the Board would agree that soils information alone is not determinative, neither is reliance on anecdotal, parcel-focused expression of opinion nor is landowner intent. Instead, to cull from the universe of lands that are "devoted to" agriculture the subset that also has "long term commercial significance" demands an objective, area-wide inquiry that examines locational factors[7] as well as the adequacy of infrastructure to support the agricultural industry. The County errs in its assumption that "long term commercial significance" is determined simply by weighing anecdotal, parcel-specific witness testimony. As explained *infra*, the Board concludes that the County's reading of the law is incorrect, clearly erroneous,[8] and Respondent therefore fails to carry its burden of proof for the removal of noncompliance and invalidity.

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[5] With respect to the "devoted to" prong of agricultural lands designations, the Supreme Court has clarified:

> [I]f land owner intent were the controlling factor, local jurisdictions would be powerless to preserve natural resource lands. Presumably in the case of agricultural land, it will always be financially more lucrative to develop such land for uses more intense than agriculture . . . All a land speculator would have to do is buy agricultural land, take it out of production, and ask the controlling jurisdiction to amend its comprehensive plan to remove the "agricultural land" designation.

City of Redmond v. Central Puget Sound Growth Management Hearings Board, 136 Wash. 2d 38 (1998), at 53.

[6] The Board agrees with CTED's reading of the guidance that WAC 365-190-050 provides in determining ALLTCS. Just as the Board would defer to the interpretation that the County gives its own words, the Board defers to CTED's interpretation of the words it adopted pursuant to RCW 36.70A.050.

[7] Many of the criteria listed at WAC 365-190-050 regarding "the possibility of more intense uses of the land" are essentially "locational factors" to be used in this "culling" process. When applying the listed considerations to the facts in the present case, the Board continues to agree with both CTED and The Snohomish County Planning and Development Services Department (**PDS**) that the Island Crossing triangle includes 75.5 acres of agricultural resource lands of long-term commercial significance, surrounded by a much larger pattern of agricultural resource land and 35.5 acre node of freeway service uses.

[8] The Board has no duty to defer to the County when interpreting the meaning of the words of the statute. The Courts have consistently recognized that statutory interpretation of the GMA is the province of the Boards, not local governments. In 2003, Division I of the Court of Appeals held:

> The goals of the Growth Management Act are better served by a consistent interpretation of that Act, and the expertise of the GMA hearings board for interpretation of the GMA is a far more reliable basis for achieving such consistency than are the various counties. . .

Quadrant v. Central Puget Sound Growth Management Hearings Board, 119 Wn. App 562, 81 P.3d 918. In 2001, Division II of the Court of Appeals held:

> . . . notwithstanding the 'deference' language of RCW 36.70A.3201, the Board acts properly when it foregoes deference to a . . . plan that is not 'consistent with the requirements and goals of the GMA.

Cooper Point Association v. Thurston County, No. 26425-1-II, 108 Wn. App. 429, 31 P.3d 28 (Wn.App. Div. II, 2001).

The County's reliance on anecdotal, parcel-focused witness testimony as the primary determining factor of LTCS has too narrow a focus - it misses the broad sweep of the Act's natural resource goal, which is to maintain and enhance the agricultural resource *industry*, not simply agricultural operations on individual parcels of land. RCW 36.70A.020(8).[9] This breadth of vision informs a proper reading of the Act's requirements for resource lands designation under .170 and conservation under .060. Reading these provisions as a whole, it is apparent that agricultural lands with "long-term commercial significance" are *area-wide patterns of land use*, not localized parcel ownerships.

Historical or speculative statements by individuals regarding their personal inability to profitably farm certain parcels does not inform a GMA-required inquiry into the *long term commercial significance* of *area-wide patterns of land use* that are to *assure the maintenance and enhancement of the agricultural land resource base to support the agricultural industry.*[10] By de-designating resource lands based on anecdotal testimony regarding specific parcels (the Island Crossing triangle viewed in isolation),[11] as opposed to the contextual land use pattern of the agricultural lands and industry infrastructure that serves the surrounding Stillaguamish River Valley (*see* Findings of Fact 16-18), the County has committed a clear error.

This view of the meaning of these statutory provisions is consistent both with prior Board and court holdings concerning the purpose, importance, and criteria for designating and conserving resource lands. *See* Appendix B. This reading of the law does not preclude the removal of all designated resource lands from that status. For example, the Board has previously found compliant the removal of agricultural resource lands that had become entirely surrounded by incompatible urban uses.[12] In another case, the Board found compliant the removal of forest resource lands that were no longer supported by necessary industry infrastructure, such as sawmills.[13]

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[9] RCW 36.70A.020(8) provides:

> Natural Resource Industries. *Maintain and enhance* natural resource-based *industries*, including productive timber, *agricultural*, and fisheries industries. Encourage the conservation of productive forest lands and productive agricultural lands, and discourage incompatible uses. Emphasis supplied.

[10] The Supreme Court has underscored the sweep and directiveness of the GMA's agricultural goal:

> Although the planning goals are not listed in any priority order in the Act, the *verbs of the agricultural provisions* ***mandate*** *specific, direct action. The County has a duty to designate and conserve agricultural lands to assure the maintenance and enhancement of the agricultural industry.*

King County v. Central Puget Sound Growth Management Hearings Board, 142 Wn.2d 543, 558; 14 P.3d 133, 141 (2000). Emphasis supplied. *See also* Code Revisor's note following RCW 36.70A.030 – Finding of Intent.

[11] Even the Intervenor observed that when people refer to "Island Crossing," they make reference to a larger area than simply the triangle of land that is the subject of Ordinance No. 04-057. Transcript, at 49.

[12] *Grubb v. Redmond*, Final Decision and Order, CPSGMHB Case No. 00-3-0004, Aug. 11, 2000, (reversed on appeal on other grounds.)

[13] *Alpine v. Kitsap County [Alpine]* coordinated with *Screen v. Kitsap County [Screen]*, Order on Compliance re: Forestry Issues in *Alpine* and Final Decision and Order in *Screen*, CPSGMHB Case Nos. 98-3-0032c and 99-3-0006c, Oct. 9, 1999.

In the present case, the County does not claim that the "Island Crossing triangle" is isolated from an area-wide land use pattern of agricultural resource lands – indeed, these agricultural lands abut no other land use activity, save the small freeway service node that is itself isolated from the existing Arlington UGA.[14] Nor does the County claim that the time for agriculture has passed in the Stillaguamish River Valley because the necessary infrastructure, including food processing plants nearby, has changed. The only evidence in this record supports the contrary conclusion. *See* Findings of Fact 16-17.

Lastly, the Board notes the County's complaint that the Board did not cite record evidence to support the FDO's statement that "[i]t is an axiom of land use planning that urban uses at urban densities and intensities inhibit adjacent farm operations."[15] This axiom is reflected in statutory language of the Act that seeks to protect agricultural uses from more intensive adjacent activities.[16] It is somewhat ironic that part of the County's rationale for converting agricultural lands at Island Crossing to commercial uses is its assertion that the impact from the businesses in the Freeway Service node has been so serious (*i.e.*, dangerous) that farming on adjacent lands is untenable.[17]

In summary, the Board agrees with Petitioners that the County fails to carry its burden of proof pursuant to RCW 36.70A.320(4) and that the County's comprehensive plan and development regulations for the Island Crossing triangle continues to not comply with the GMA's resource lands provisions, specifically RCW 36.70A.020(8) and .040, .060(1), and .170(1)(a).

2. Urban Growth Areas

a. Positions of the Parties

Snohomish County and Lane

The County states that its "record now includes a land capacity analysis demonstrating the need to expand the Arlington UGA." SATC, at 9. The County cites County-wide Planning Policy (**CPP**) UG-14.d[18] and points to a report prepared by Higa-Burkholder

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[14] The County's characterization of the node of freeway service uses at Island Crossing as "urban growth" has been consistently rejected by the Board and the Courts. *See* Appendix B.

[15] FDO, at 29.

[16] RCW 36.70A.060(1) provides in relevant part:

> Counties and cities shall require that all plats, short plats, development permits, and building permits issued for development activities on, or within five hundred feet of, lands designated as agricultural lands, . . . contain a notice that the subject property is within or near designated agricultural lands, . . . on which a variety of commercial activities may occur that are not compatible with residential development for certain periods of limited duration.

[17] The Board takes official notice of the Snohomish County Code to observe that the range and intensity of uses allowed in the County's General Commercial zone is far greater than in the Freeway Service Zone. Logic dictates that the County's new General Commercial zoning will therefore have a greater impact on the surrounding agricultural lands than is now the case with the impacts from the lesser intensity Freeway Service uses.

[18] CPP UG-14.d provides in relevant part:

Associates (**HBA**) titled "Buildable Lands Report 2003 Update, City of Arlington UGA, Analysis of Availability of Commercial Parcels and Land Supply" (the **HBA Large Parcel Analysis**). The County explains:

> The analysis sought to determine whether there is a shortage of commercial parcels in Arlington's UGA capable of supporting large-scale commercial uses that require frontage on a major arterial and visual access. The analysis concluded that three sites exist within the Arlington UGA that have adequate size and good exposure to major arterials, but that none exist with direct exposure and access to Interstate 5.

SATC, at 11.

The County states that the City of Arlington concurred with the HBA Large Parcel Analysis by adopting Resolution 679 on May 17, 2004, and that after the May 19, 2004 public hearing and May 24, 2004 public hearing, the County Council agreed with the conclusions by adopting Emergency Ordinance 04-057. SATC, at 12. In refuting the suggestion by 1000 Friends that other parcels were also available meeting the criteria adopted in the HBA Large Parcel Analysis, the County argues:

> A laundry list of parcels simply cannot compare to the reasoned analysis of the availability of developable properties the Council had before it. The Council reasonably relied on the information before it and the Board cannot substitute its judgment for that of the Council.

Id.

Expansion of the Boundary of an Individual UGA: Expansion of the boundary of an individual UGA to include additional . . . commercial and industrial land shall not be permitted unless it is supported by a land capacity analysis adopted by the County Council pursuant to RCW 36.70A.110 and otherwise complies with the Growth Management Act, . . .

. . .

4. For the expansion of the boundary of an individual UGA to include additional commercial or industrial land, the county and the city or cities within the UGA document that commercial or industrial land consumption within the UGA (city plus unincorporated UGA combined) since the start of the twenty-year planning period, equals or exceeds fifty percent of the developable commercial or industrial land supply within the UGA at the start of the planning period. In UGAs where this threshold has not yet been reached, the boundary of an individual UGA may be expanded to include additional commercial or industrial land if the expansion is based on an assessment that concludes that there is a deficiency of larger parcels within that UGA to accommodate the remaining commercial or industrial growth projected for that UGA. Other parcel characteristics determined to be relevant to the assessment of the adequacy of the remaining commercial or industrial land base, as documented in the most recent Snohomish County Growth Monitoring Report or the buildable lands review and evaluation (Building Lands Report), as they may be confirmed or revised based upon any new information presented at public hearings, may also be considered as a basis for expansion of the boundary of an individual UGA to include additional commercial or industrial land.

The County argues that "the Large Parcel Analysis is the type of land capacity analysis contemplated by UG-14, and it complies with the GMA by satisfying the requirements of CPP UG-14, which implements RCW 36.70A.215." SATC, at 13.

Turning to the UGA locational factors of RCW 36.70A.110, the County also asserts that it is now in compliance. The County states that "the Council reconsidered the locational requirements in light of the entire record and concluded that Island Crossing is adjacent to land characterized by urban growth." *Id.* Summing up the Council's reasoning, the SATC states:

> As revealed in the proceedings below, sewer service is available to Island Crossing and there are existing commercial uses within Island Crossing. In consideration of the voluminous testimony that Island Crossing is no longer of long-term commercial significance, its adjacency to the City of Arlington, and the existing urban-level uses within Island Crossing, the Council concluded that the Island Crossing triangle meets the Legislature's locational requirements for a UGA.

Id.

CTED, 1000 Friends, and SFCD

CTED argues that Ordinance No. 04-057 does not address any of the flaws that the Board found with the County's UGA designation with Ordinance No. 03-063. CTED begins its attack on the County's compliance by arguing that the HBA Large Parcel Analysis "does not address the criteria specified in RCW 36.70A.110 and does not exhibit the characteristics of a land capacity analysis under the GMA." CTED Response, at 17. CTED contends that the criteria used by the HBA Large Parcel Analysis are those that might used by "big-box" stores and automobile dealerships to determine where to locate, rather than those mandated in RCW 36.70A.110. CTED Response, at 18. CTED further alleges that using such criteria for large-scale commercial development would favor development in less expensive rural areas or in strip development along freeways and major arterials, in contravention of the Act's goals favoring compact urban development. *Id.*

1000 Friends agrees with CTED that Ordinance No. 04-057 does not meet the locational criteria of RCW 36.70A.110 and questions the objectivity, and therefore the credibility of the HBA Large Parcel Analysis. 1000 Friends points out that the report was paid for by consultants hired by Mr. Lane, and opines that the consultant's motivation "is not dispassionate, but is to get Mr. Lane his redesignation." *Id.* 1000 Friends also takes issue with the validity of the analysis, arguing:

> The biggest problem is that it [the analysis] is based on Scenario B of the County's Buildable Lands Report. Scenario B does not use the population and employment targets that were adopted by the County. Consequently,

any analysis based on Scenario B cannot by definition comply with the GMA.

1000 Friends Response, at 7.

1000 Friends also disputes the accuracy of the report relative to availability of large lots in the Arlington UGA and complains that it does not examine the possibility of rezoning additional large lots to commercial designations. *Id.*

SFCD agrees with 1000 Friends that the HBA Large Lot Analysis is suspect because it was prepared by Mr. Lane's consultant, and argues that it therefore should be discounted as merely an expression of landowner intent. SFCD Response, at 7. SFCD also argues that the County's Department of Planning and Development Services does not support the Burkholder "updates." *Id.*

b. Board Analysis

It is a close question whether the HBA Large Lot Parcel Analysis is consistent with the entirety of UG-14(d). There appears to be no dispute on the question of whether the 50% threshold named in UG-14(d) has been exceeded, and no argument was presented that the County must conduct its re-evaluation and adjustments in the context of a county-wide review of capacity and need. While the petitioners raise questions about the methodology and assumptions of the analysis, the Board is inclined to agree that the HBA Large Parcel Analysis cures the County's inconsistency with CPP UG-14(d) and thereby cures the noncompliance with RCW 36.70A.215.

However, achieving consistency between Ordinance 04-057 and CPP UG-14(d), does not cure the County's noncompliance with RCW 36.70A.110 because it does not address the "UGA location" deficiencies identified in the FDO. The "summary" of the County's reasoning (SATC, at 13, ln. 13-20) simply reiterates the arguments that the Board rejected in the FDO. No new facts or reasoning are presented to disturb the Board's conclusions that Island Crossing continues to have agricultural lands of long-term commercial significance, that the presence of a sewer line is irrelevant, particularly given its limitations,[19] that the freeway service uses do not rise to the status of "urban growth,"[20] and that Island Crossing is not "adjacent" to the Arlington UGA or a

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[19] No new evidence or persuasive argument was presented to the Board to undercut the Court of Appeals' 2001 conclusion that:

> The only urban development permits issued for Island Crossing are for the area that serves the freeway. Further, the substantial shoreline development permit for sewer service in the freeway area explicitly 'prohibits any service tie-ins outside the Freeway Service Area.' Thus, adequate public facilities and services do not currently exist.

Lane v. Central Puget Sound Growth Management Hearings Board, 2001 WL 244384 (Wash. App. Div. I, Mr. 12, 2001). *See* Appendix B.

[20] No new evidence or persuasive argument was presented to the Board to undercut the Superior Court's 1997 conclusion that "An isolated special purpose freeway service node does not constitute generalized urban growth." *See* Appendix B.

residential "population" of any sort.[21] In fact, the private lands within this proposed UGA expansion would be connected to the Arlington UGA only by means of a 700 foot long 'cherry stem' consisting of nothing but public right-of-way. Findings of Fact Nos. 11 and 13. While such dramatically irregular boundaries were common in the pre-GMA era, the meaning of "adjacency" under the GMA precludes such behavior.

Even if the HBA Large Parcels Report and CPP UG-14 compels the County to attempt to expand Arlington's UGA, it is significant to recognize that such expansion is a self-imposed, rather than statutorily compelled, duty. Therefore, the County cannot point to UG-14 as justification for Ordinance No. 04-057. Specifically on point, the Supreme Court has held that a CPP that "mandates" the inclusion of specific lands within a UGA cannot trump the statutory requirements of RCW 36.70A.110.

> We conclude that a comprehensive plan provision is not immune from challenge merely because the County was required to adopt the provision by its CPPs . . . There is no statutory language immunizing provisions of the comprehensive plan from review on the grounds that those provisions are mandated by the CPPs. *A UGA designation that blatantly violates GMA requirements should not stand simply because CPPs mandated its adoption.*

King County v. Central Puget Sound Growth Management Hearings Board, 138 Wn.2d 161, 176-177; 979 P.2d 372, 382 (1999). Emphasis supplied.

Here, the Board has determined, *supra*, that Ordinance No. 04-057 does not comply with the statutory requirements for resource lands and urban growth areas. Therefore, an argument that UG-14 somehow compels the inclusion of Island Crossing in the Arlington UGA is unavailing.

The Board concludes that Snohomish County has not carried its burden of proof in its attempt to overcome the finding of invalidity and noncompliance in the FDO, particularly with regard to RCW 36.70A.020(1) and (2), RCW 36.70A.040, and RCW 36.70A.110. The Board remains convinced that the County's reading of these areas of the law is in error, clearly erroneous.[22]

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[21] This point is even more apparent when the "Island Crossing triangle" is considered in context to the geography and topography of the area. It sits in the flood plain of the Stillaguamish River, suffering from the same damaging floods that occur every three to five years throughout the basin. Findings of Fact Nos. 7 and 8. Unsurprisingly, the elevation of Island Crossing is at essentially the same elevation as designated agricultural resource lands to the west, north and east, whereas the existing Arlington UGA to the south is on higher ground. Finding of Fact 18.

[22] The Board also notes that, in addition to failing to comply with the locational requirements of RCW 36.70A.110, the inclusion of the Island Crossing triangle within the UGA would create an impermissible conflict with RCW 36.70A.060(4). The County admits that it has not "enacted a program authorizing transfer or purchase of development rights" of designated agricultural resource lands within urban growth areas. Transcript, at 57. Since the Board has found, *supra*, that the de-designation of 75.5 acres of agricultural resource lands in the Island Crossing triangle is noncompliant, and invalid, and since the

VI. CONCLUSIONS OF LAW

A. Noncompliance and Invalidity

Based on the analysis in Section V *supra*, the Board concludes that Snohomish County's comprehensive plan and development regulations for the Island Crossing Area continues not to comply with the goals and requirements of the GMA, specifically RCW 36.70A.020(1), (2), (8), and (10) and RCW 36.70A.040, RCW 36.70A.060(1), RCW 36.70A.110, and RCW 36.70A.170(1)(a), respectively. Therefore, **the Board will enter a Finding of Continuing Noncompliance and Continuing Invalidity.**

B. Sanctions

Because the Board finds Snohomish County in continuing noncompliance with the GMA, RCW 36.70A.330(3) directs that these findings be transmitted to the Governor. Significantly, Ordinance No. 04-057 represents Snohomish County's **third** attempt under the GMA (and second attempt within the past nine months)[23] to convert Island Crossing from a part of the designated agricultural resource lands of the Stillaguamish River Valley into Arlington's urban growth area. It has done so notwithstanding consistent contrary readings of the Growth Management Act by the Snohomish County SEPA Responsible Official,[24] Snohomish County Executive,[25] the Growth Management Hearings Board,[26] Snohomish County Superior Court,[27] the First Division of the Washington State Court of Appeals,[28] and the Governor of the State of Washington.[29]

By its actions, the County Council has evidenced an ongoing unwillingness to comply with those portions of the Growth Management Act with which it disagrees. Therefore, the Board will recommend to the Governor that he impose financial sanctions authorized by RCW 36.70A.340. The Board will further recommend that any sanctions be lifted only when Snohomish County provides sufficient assurance that it will take no further legislative action contrary to the GMA, as interpreted by the Board in this matter, unless the Board's holdings are reversed by a court of competent jurisdiction.

County admits that it has no transfer of development rights program pursuant to RCW 36.70A.060(4), Snohomish County is further barred from including this 75.5 acres of land within the UGA.

[23] Ordinance No. 03-063 was adopted on September 10, 2003, FDO, Finding of Fact 1; Ordinance No. 04-057 was adopted May 24, 2004. Finding of Fact 2.

[24] PDS Report, Index of Record No. 21, and DSEIS for Dwayne Lane Docket Proposal, Index of Record No. 22, at 2-36.

[25] Executive Veto Message re: Dwayne Lane Docket Proposal, Index of Record No. 1114.

[26] CPSGMHB Case No. 98-3-0033c, *Lane, et al., v. Snohomish County*, Order Granting Motion to Dismiss [Lane], Jan. 20, 1999; and CPSGMHB Case No. 03-3-0019c, *1000 Friends v. Snohomish County*, FDO, March 22, 2004.

[27] Snohomish Superior Court Case No. 96-2-03675-5, Nov. 19, 1997. *See* Appendix B.

[28] *Lane v. Central Puget Sound Growth Management Hearings Board*, 2001 WL 244384 (Wash. App. Div. I, Mar. 12, 2001). *See* Appendix B.

[29] CTED Petition for Review, attached letter from Governor Gary Locke.

The Board recognizes that the Governor will decide whether to impose sanctions and, if so, which to choose from among those listed at RCW 36.70A.340. The Governor likewise will decide the circumstances under which any imposed sanctions will be lifted and when further proceedings before the Board are necessary and appropriate.

VII. ORDER

Having reviewed and considered the above-referenced documents, the goals and requirements of the Growth Management Act, having considered the arguments of the parties, and having deliberated on the matter, the Board ORDERS:

1) Snohomish County has **failed to carry its burden of proof** to justify a Board finding of compliance and rescission of invalidity. Snohomish County's adoption of Ordinance No. 04-057 **does not comply** with the requirements of RCW 36.70A.040, .060, .110, .170, and **was not guided by** RCW 36.70A.020 (1), (2), (8) and (10); the County's action was **clearly erroneous.**

2) Because the continued validity of Ordinance No. 04-057 would substantially interfere with the fulfillment of RCW 36.70A.020 (1), (2), (8) and (10), the Board also enters a **determination of invalidity** for Ordinance No. 04-057.

3) A copy of this Order shall be transmitted to the Governor together with a letter recommending the imposition of financial sanctions pursuant to RCW 36.70A.340. The parties to this case shall be copied on the letter to the Governor.

4) At such time as the Governor so indicates, or a court directs, the Board shall notify the parties to this case of a schedule for further compliance proceedings.

So ORDERED this 24th day of June 2004.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

_____
Bruce C. Laing, FAICP
Board Member

_____
Edward G. McGuire, AICP
Board Member
Note: Mr. McGuire files a concurring opinion below

_____
Joseph W. Tovar, FAICP
Board Member

Note: This order constitutes a final order as specified by RCW 36.70A.300. Any party wishing to file a motion for reconsideration of this final order must do so within ten days of service of this order. WAC 242-02-830(1). Any party wishing to appeal this final order to superior court must do so within thirty days of service of this order. WAC 242-02-898.

Concurring Opinion of Board Member McGuire

I concur with the conclusions of my colleagues as expressed in this Order, save one. I would have addressed Legal Issue 5, pertaining to the Ordinance's compliance with the GMA's critical areas requirements for frequently flooded areas. Legal Issue 5 states:

> By expanding the Arlington UGA into a frequently flooded area and by redesignating lands within that area for commercial use, is Snohomish County Amended Ordinance No. 03-063 in noncompliance with RCW 36.70A.060 and RCW 36.70A.170?

See Corrected FDO, at 37.

I agree with the County's assertion that: 1) it has identified and designated critical areas, including frequently flooded areas, as required by RCW 36.70A.170; and 2) it has adopted critical areas development regulations intended to protect those critical areas, including frequently flooded areas. County Response, at 4-6. Intervenor Lane even acknowledges that "[N]o development will be allowed in Island Crossing that is not required to meet all critical areas regulations, including requirements for mitigation." Lane Response, at 30.

However, the direction provided in Ordinance No. 04-057's[30] Findings undermine the importance of meeting the County's own critical areas mitigation requirements. Several Findings speak to mitigation:

- In Ex. 135, *applicant* of the Island Crossing Interchange Docket Proposal states various development techniques and plans which will be *voluntarily used to minimize the prospect of flood impacts. . . . See* Ordinance No. 04-057, Section 1, B.9.AA; and Finding of Fact 4, (emphasis supplied).
- After the effective date of Emergency Ordinance No. 04-057, *development in the Island Crossing Interchange Docket Proposal area added to the Arlington UGA* by Emergency Ordinance No. 04-057 *should be conditioned upon use of the flood protection measures outlined above in finding AA of Section 1,* ***provided such flood protection measures are technically feasible and do not defeat the purpose of the development.*** *See* Ordinance No. 04-057, Section 3, (emphasis supplied).

[30] Ordinance No. 03-063 was the subject of the Board's FDO; however, Ordinance No. 03-063, Section 1, Finding V, is virtually the same as Finding B.9.AA quoted *supra*. Likewise, Ordinance No. 03-063, Section 3, contains the same language as Section 3 quoted *supra*.

These statements draw me to conclude that notwithstanding the actual mitigation requirements of the County's critical areas development regulations, the Ordinance directs that this proposal will be voluntarily mitigated by the applicant to the extent needed flood protection measures are technically feasible and do not defeat the purpose of the development. If this is the extent of protection the County provides for frequently flooded areas - voluntarily determined by the applicant - I would find **noncompliance with RCW 36.70A.060(2).**

Appendix A

PROCEDURAL HISTORY PRECEDING FINAL DECISION AND ORDER

On October 23, 2003, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from 1000 Friends of Washington, Stillaguamish Flood Control District (**SFCD**), Agriculture for Tomorrow, and Pilchuck Audubon Society (collectively, **Petitioners** or **1000 Friends**) and "Request for Expedited Review." Petitioners challenge the adoption by Snohomish County (the **County** or **Snohomish**) of Amended Ordinance No. 03-063.

The basis for the challenge is alleged noncompliance with various provisions of the Growth Management Act (**GMA or Act**). The matter was assigned Case No. 03-3-0019 and is hereafter referred to as *1000 Friends, et al., v. Snohomish County.* Board member Joseph W. Tovar is the Presiding Officer for this matter.

On October 28, 2003, the Board issued the "Notice of Hearing" in this matter.

On November 5, 2003, the Board received "Snohomish County's Response to Petitioners' Request for Expedited Review." Also on this date, the Board received from Dwayne Lane a "Motion for Status as Intervenor" (the **Dwayne Lane Motion to Intervene**) in Case No. 03-3-0019 and a draft "Order Granting Motion for Status as Intervenor." Also on this date, the Board received a PFR from "The Director of the State of Washington Department of Community, Trade, and Economic Development" (the **CTED II PFR**) challenging the adoption of Snohomish County Ordinances Nos. 03-063 and 03-104, together with a "Motion to Consolidate" (the **CTED Motion to Consolidate**) with Cases Nos. 03-3-0017 and 03-3-0019. The CTED II PFR case was assigned Case No. 03-3-0020 and the case was titled *CTED v. Snohomish County [II].*

On November 6, 2003, beginning at 10:00 a.m., the Board conducted the prehearing conference in the training room on the 24th floor of the Bank of California Building, 900 Fourth Avenue in Snohomish. At the prehearing conference, the presiding officer orally granted the portion of the CTED Motion to Consolidate that includes issues addressed to Snohomish Ordinance No. 03-063. He indicated that the legal issues addressed to Snohomish Ordinance No. 104 would not be consolidated with Case No. 03-3-0019, but would be referred to Mr. McGuire, the presiding officer in Case No. 03-3-0017. The presiding officer also orally granted the motion by Dwayne Lane to intervene in the consolidated 1000 Friends and CTED challenges to Snohomish Ordinance No. 03-063.

On November 10, 2003, the Board received "Snohomish County-Camano Association of Realtors and Master Builders Association of King and Snohomish Counties' Joint Opposition to CTED's Motion to Consolidate." The caption of this pleading listed both Case No. 03-3-0017 (CTED I) and Case No. 03-3-0020 (CTED II).

On November 12, 2003, the Central Puget Sound Growth Management Hearings Board (the **Board**) issued "Prehearing Order, Order Partially Granting Motion for

Consolidation, and Order Granting Motion for Intervention" (the **PHO**) in the above captioned matter. The PHO set the Final Schedule for the submittal of motions and briefs. PHO, at 4-5. Later on this same date, the Board received from Petitioner 1000 Friends a letter (the **1000 Friends letter**) attached to which were: (1) a City of Arlington Development Services "City Council Agenda Bill" with a Council Meeting Date of September 17, 2003 and the subject heading caption "Consideration of Intention of Annexation 10% Petition for Island Crossing Annexation (File No. A-03-068)" and (2) a memorandum, dated September 7, 2003, from Cliff Strong, Arlington Planning Manager to the Mayor and City Council.

On November 13, 2003, the Board received from the County a letter (the **County letter**) responding to the 1000 Friends letter.

On November 14, 2003, the Board received "Snohomish County's Index to the Record" (the **County's Index**). Later on this same date, the presiding officer directed Susannah Karlsson, the Board's Administrative Officer, to contact the parties to the case for the purpose of setting up a telephone conference call to hear oral argument regarding the 1000 Friends letter and the County letter on Tuesday, November 18, 2003 commencing at 9 a.m.

On November 18, 2003, the Board conducted a telephonic conference call to hear argument regarding the 1000 Friends letter and the County letter. Participating for the Board were Bruce C. Laing and Joseph W. Tovar, presiding officer. Participating for 1000 Friends was John T. Zilavy, for the County was Andrew S. Lane, for Stillaguamish were Henry Lippek and Ashley E. Evans, for Intervenor Dwayne Lane was Todd C. Nichols, and for the Washington State Department of Community, Trade and Economic Development was Alan D. Copsey.

On November 24, 2003, the Board issued "Order Granting Motion to Supplement the Record" (the **First Order on Motions**). The First Order Granting Supplementation admitted to the record before the Board two supplemental exhibits and assigned them exhibit numbers Supp. Ex. 1 and Supp. Ex. 2.

On December 4, 2003, the Board received "1000 Friends' Motion to Correct the Record and Index of Record" (the **1000 Friends Motion**) with proposed supplemental exhibits A, B, and C.

On December 5, 2003, the Board received "Flood Control District's Motion to Correct the Record and Index of the Record," (the **Stillaguamish Motion**) with proposed supplemental exhibits A and B.

On December 12, 2003, the Board received "Snohomish County's Response to Motions to Supplement the Record" (the **County Response**) with Attachments A, B and C. On this same date the Board received "Dwayne Lane's Memorandum in Opposition to Correct the Record and Index of Record" (the **Lane Memorandum**) together with the

"Declaration of Dwayne Lane Re: Motions to Correct or Supplement the Record" (the **Lane Declaration**).

On December 18, 2003, the Board received "Petitioners' Reply to Motion to Correct the Record and Index of Record" (the **1000 Friends Reply**).

On December 19, 2003, the Board received "Flood District's Reply to Dwayne Lane and Snohomish County's Responses to Motion to Correct the Record and Index of Record". (the **Flood District Reply**).

On January 2, 2004, the Board issued "Second Order on Motions" (the **Second Order on Motions**).

On January 9, 2004, the Board received the "Petitioner Stillaguamish Flood Control District's Prehearing Brief" (the **Flood District PHB**) "1000 Friends of Washington Opening Brief" (the **1000 Friends' Opening Brief**); and "CTED's Opening Brief" (the **CTED Opening Brief**).

On January 23, 2004, the Board received "Snohomish County's Response Brief" (the **County Response**) and "Intervenor Lane's Hearing Response Memorandum" (the **Lane Response**) and "Intervenor Lane's Motion to Supplement the Record" (the **Lane January 23, 2004 Motion to Supplement**).

On January 29, 2004, the Board received "Flood District's Reply Brief" (the **Flood District Reply**), and "CTED's Reply Brief" (the **CTED Reply**).

On January 30, 2004, the Board received "1000 Friends of Washington, Agriculture for Tomorrow, and Pilchuck Audubon Society Reply Brief" (the **1000 Friends Reply**).

The Board conducted the Hearing on the Merits (the **HOM**) in this matter on February 2, 2004 in the conference room adjacent to the Board's office, Suite 2470, 900 Fourth Avenue in Seattle. Present for the Board were Edward G. McGuire, Bruce C. Laing, and Joseph W. Tovar, presiding officer. Also present were the Board's legal externs Ketil Freeman and Lara Heisler. Court reporting services were provided by Scott Kindle of Mills and Lessard, Seattle. The parties were represented as follows: for 1000 Friends was John T. Zilavy; for Stillaguamish Flood Control District were Henry Lippek and Ashley Evans; for CTED was Alan D. Copsey; for the County was Andrew S. Lane; and for Intervenor Dwayne Lane was Todd C. Nichols. No witnesses testified. At the conclusion of the HOM, the presiding officer directed that a transcript (the **HOM Transcript**) be prepared.

On February 11, 2004, the Board received a letter from counsel for the County indicating that "Snohomish County will not be submitting a post-hearing rebuttal to 1000 Friends' late reply brief."

On February 13, 2004, the Board received "Intervenor Lane's Surrebuttal Memorandum" (the **Lane Surrebuttal**).

On March 18, 2004, the Board received "1000 Friends of Washington, Agriculture for Tomorrow, and Pilchuck Audubon Society Motion to Supplement the Record" (the **1000 Friends March 18, 2004 Motion to Supplement**). Later on this same date, the Board received "Respondent Snohomish County's Response to 1000 Friends' Motion to Supplement the Record" (the **County Response to the 1000 Friends March 18, 2004 Motion to Supplement**).

On March 19, 2004, the presiding officer directed the Board's Administrative Officer Susannah Karlsson to contact the parties to ask if they wished to file any response to the 1000 Friends March 18, 2004 Motion to Supplement. She made telephone contact with all parties. Later on this same date, the Board received "Intervenor Dwayne Lane's Response to 1000 Friends' Motion to Supplement the Record" (the **Lane Response to the 1000 Friends March 18, 2004 Motion to Supplement**) and correspondence from counsel for the Stillaguamish Flood Control District (the **Flood District Letter**).

Appendix B

HISTORY OF GMA LITIGATION RE: ISLAND CROSSING[31]

1. Among the seventy issues challenging the GMA compliance of Snohomish County's first comprehensive plan in 1996 was an allegation by Pilchuck Audubon Society that the County had violated the agricultural resource lands provisions of the Growth Management Act in removing from resource lands designation lands in the Island Crossing Area. The Board upheld the County's action. CPSGMHB, *Sky Valley, et al., v. Snohomish County*, Final Decision and Order, Case No. 96-3-0068c, April 15, 1996.

2. On November 19, 1997, Snohomish County Superior Court, in reviewing the Board's decision in *Sky Valley v. Snohomish County,* issued a "Judgment Affirming in Part and Remanding in Part," Superior Court Case No. 96-2-03675-5.

3. In an oral decision incorporated by the Court into the Judgment Affirming in Part and Remanding in Part, the Superior Court stated:

> Evidence and arguments supporting de-designation were presented by [the City of Arlington] . . . focused almost exclusively on issues relating to the City of Arlington's economic growth and well-being, and not on Growth Management Act Criteria. . . .An isolated special purpose freeway service node does not constitute generalized urban growth . . . What happened to the fundamental axiom of the Growth Management Act that "the land speaks first"? Where does the Act state that the economic welfare of cities speaks first? Where does the evidence submitted by Arlington even reference the agricultural productivity or the floodplain status of the lands which are not proposed for automobile dealerships? Freeways are no longer longitudinal strips of urban opportunity. Agricultural lands must be conserved as a first priority, and urban centers must be compact, separate and distinct features of the remaining part of the landscape.

Id., Transcript of Proceedings, Court's Oral Ruling, at 14-18.

4. The Superior Court remanded the *Sky Valley* matter to the Board, finding no substantial evidence to support the removal of the agricultural designation. PDS Report, at 4.

5. Subsequent to the Superior Court remand, the Snohomish County Planning Commission and County Council reconsidered the land use designations for Island Crossing in 1998 and redesignated the agricultural areas as agricultural and

[31] This history was set forth in the FDO, at 2-3.

redesignated the commercial area as Rural Freeway Service, and removed Island Crossing from the Arlington UGA.
Id.

6. Dwayne Lane, the owner of 15 acres of land bordering Interstate 5 in Island Crossing, challenged the County's designation of Island Crossing as agricultural resource land and filed a petition for review with the Growth Management Hearings Board. The Board rejected Lane's appeal. CPSGMHB Case No. 98-3-0033c, *Lane, et al., v. Snohomish County*, Order Granting Motion to Dismiss [Lane]. Jan. 20, 1999.

7. Snohomish County Superior Court affirmed the Board's January 20, 1999 Order, after which Lane appealed to the Court of Appeals. *Lane v. Central Puget Sound Growth Management Hearings Board*, 2001 WL 244384 (Wash. App. Div. I, Mar. 12, 2001).

8. The Court of Appeals described the Island Crossing area as follows:

> Island Crossing is composed of prime agricultural soils and has been described as having agricultural value of primary significance. Except for the County's 1995 dedesignation of Island Crossing as agricultural land, Island Crossing has been designated and zoned agricultural since 1978. Thus, the record supports a finding that Island Crossing is capable of being used for agricultural production. *See City of Redmond v. Cent. Puget Sound Growth Mgmt. Hrgs. Bd.*, 136 Wn.2d 38, 53, 959 P.2d 1091 (1998).
>
> Although Island Crossing borders the interchange of Interstate 5 and State Road 530, it is separated from Arlington by farmland. Indeed, the record contains evidence to indicate that most of the land in Island Crossing is being actively farmed, except a small area devoted to freeway services. Thus, the record indicates that the land is actually used for agricultural production. *See City of Redmond*, 136 Wn.2d at 53. The only urban development permits issued for Island Crossing are for the area that serves the freeway. Further, the substantial shoreline development permit for sewer service in the freeway area explicitly 'prohibits any service tie-ins outside the Freeway Service Area.' Thus, adequate public facilities and services do not currently exist. *Id.*

FDO, at 2-3.

APPENDIX F

CENTRAL PUGET SOUND
GROWTH MANAGEMENT HEARINGS BOARD
STATE OF WASHINGTON

1000 FRIENDS OF WASHINGTON, STILLAGUAMISH FLOOD CONTROL DISTRICT, AGRICULTURE FOR TOMORROW, PILCHUCK AUDUBON SOCIETY; and THE DIRECTOR OF THE STATE OF WASHINGTON DEPARTMENT OF COMMUNITY, TRADE AND ECONOMIC DEVELOPMENT, Petitioners, v. SNOHOMISH COUNTY, Respondent, and DWAYNE LANE, Intervenor.	)	**Case No. 03-3-0019c** ***[Island Crossing]*** **ORDER GRANTING RECONSIDERATION [Revising Finding of Fact 17] and DENYING MOTION TO ENTER A DETERMINATION OF VALIDITY PUSUANT TO RCW 36.70A.302(4)**

I. BACKGROUND

On June 24, 2004, the Board issued its "Order Finding Continuing Noncompliance and Continuing Invalidity and Recommendation for Gubernatorial Sanctions." The Order provides:

> Having reviewed and considered the above-referenced documents, the goals and requirements of the Growth Management Act, having

considered the arguments of the parties, and having deliberated on the matter, the Board ORDERS:

1) Snohomish County has **failed to carry its burden of proof** to justify a Board finding of compliance and rescission of invalidity. Snohomish County's adoption of Ordinance No. 04-057 **does not comply** with the requirements of RCW 36.70A.040, .060, .110, .170, and **was not guided by** RCW 36.70A.020 (1), (2), (8) and (10); the County's action was **clearly erroneous.**

2) Because the continued validity of Ordinance No. 04-057 would substantially interfere with the fulfillment of RCW 36.70A.020 (1), (2), (8) and (10), the Board also enters a **determination of invalidity** for Ordinance No. 04-057.

3) A copy of this Order shall be transmitted to the Governor together with a letter recommending the imposition of financial sanctions pursuant to RCW 36.70A.340. The parties to this case shall be copied on the letter to the Governor.

4) At such time as the Governor so indicates or a court directs, the Board shall notify the parties to this case of a schedule for further compliance proceedings.

June 24, 2004, Order, at 25.

On July 6, 2004, the Board received "Snohomish County's Motion for Reconsideration and Motion for Determination of Validity Pursuant to RCW 36.70A.302(4)" (**County Motion**). On this same day, the Board transmitted this motion, via fax, to the Governor's Office.

On July 9, 2004, the Board received "Petitioners' Response to County's Motion for Reconsideration and Determination of Invalidity" (**1000 Friends Answer**).

On July 12, 2004, the Board received: "CTED's Response to Snohomish County's Motion for Reconsideration and Motion for Determination of Validity Pursuant to RCW 36.70A.302(4)" (**CTED Answer**); and "Flood District's Response to Snohomish County's Motion for Reconsideration and Motion for Determination of Validity Pursuant to RCW 36.70A.302(4)" (**Flood Control District Answer**). On this same day, the Board transmitted all three Answers, via fax, to the Governor's Office.

On July 15, 2004, the Board informed the Governor's Office, via phone, that in order to finish the case, the Board intended to respond to the County Motions within the 20 day

time period for responding to motions for reconsideration; and that a copy of the Board's Order would be transmitted to the Governor's Office upon its issuance.

II. DISCUSSION OF MOTIONS

A. Motion to Reconsider Finding of Fact 17

Position of the parties:

The County argues that Finding of Fact (**FoF**) 17 is inaccurate, is based upon an inadmissible exhibit and should be deleted or corrected. County Motion, at 2. The County urges the Board to either delete FoF 17 or revise it to reflect that no crops are currently being grown at the Island Crossing location. *Id.*, at 3.

The Flood Control District argues that Exhibit 6 is in the record, since in its Response Brief, the District moved to supplement the record with the exhibit and there was no timely objection raised by the County. The District suggests that if the Board chooses to revise FoF 17, it should reflect the statement in the Exhibit that indicates "Twin City Foods could contract that land today if it were available." Flood Control District Answer, at 3. Nonetheless, the District argues that revising or modifying this FoF does not alter the Board's conclusions in the 6/24/04 Order. *Id.*

CTED argues that the County did not object to the attachment of Exhibit 6 to the Flood Control Districts Response Brief, and absent a timely objection, the Board was "entitled to make a such a determination [whether the exhibit would be necessary or of substantial assistance to the board in reaching its decision. – RCW 36.70A.290(4)] as to Exhibit 6 and to rely on that exhibit in reaching its decision." CTED Answer, at 2. CTED notes that there is no dispute as to whether Island Crossing has ever been farmed, it has; the Board has concluded that Island Crossing is devoted to agriculture. Therefore, CTED contends, "whether the Board revises Finding of Fact 17 has no bearing on any conclusions reached in the [6/24/04 Order]." *Id.*

Petitioners 1000 Friends of Washington "[O]ppose the County's Motion for Reconsideration and join in the brief and argument presented by the Washington State Department of Community, Trade and Economic Development and the Stillaquamish Flood Control District in opposing the County's motion." 1000 Friends Answer, at 1-2.

Board Discussion:

Finding of Fact 17, as stated in the Board's 6/24/04 Order states:

17. Lands in the "Island Crossing triangle" have historically and are currently being contracted to provide crops for processing by Twin City Foods. [*Citing* Stillaquamish Flood Control District Response, Ex. 6.[1]]

First, the Board acknowledges that the Flood Control District moved to supplement the record with Ex. 6,[2] and that absent a timely objection from the County, the Board allowed the exhibit and considered it in its deliberations as permitted pursuant to RCW 36.70A.290(4). For clarification, the Board **affirms** its decision to consider the exhibit as a supplemental exhibit and for the record **grants** the Flood Control District's motion to supplement the record with this exhibit.

Second, as the Flood Control District suggests, "A more precise rewriting [of FoF 17 based on the June 7, 2004 letter – Ex. 6] would be, 'Lands in the 'Island Crossing triangle' have been contracted in the past to provide *peas* for processing by Twin City Foods, *and Twin City Foods could contract that land if it were available.*'" Flood Control District Answer, at 3; (emphasis in original).

The Board agrees, FoF 17 inaccurately indicates that Twin City Foods currently has contracts for crops from the Island Crossing triangle. This is not the case.

Conclusion:

The Board has reviewed the Order, Exhibit 6 and the briefing of the parties and concludes that it will **grant** the County's Motion to Reconsider and revise FoF 17 to more accurately reflect Ex. 6. FoF is hereby revised to read as follows:

17. Lands in the "Island Crossing triangle" have been historically ~~and are currently being~~ contracted to provide crops for processing by Twin City Foods. [*Citing* Stillaquamish Flood Control District Response, Ex. 6.]

The Board agrees with Petitioners, that this revision to FoF 17 does not alter the Board's conclusions in the 6/24/04 Order. As the Supreme Court has indicated, neither land owner intent nor current use is conclusive in determining whether a particular parcel is devoted to agricultural use. *See City of Redmond v. CPSGMHB*, 136 Wn 2d 38, 959 P 2d 1091 (1998).

[1] Ex. 6 is a June 7, 2004 letter from Twin City Foods to Snohomish County.
[2] *See* Flood Control District Response brief, at 17; and Flood District Answer, at 3.

B. Motion for Determination of Validity Pursuant to RCW 36.70A.302(4)

Applicable Law

RCW 36.70A.302(4) provides:

> If the ordinance that adopts a plan or development regulation under this chapter includes a savings clause intended to revive prior policies or regulations in the event the new plan or regulations are determined to be invalid, the board shall determine under subsection (1) of this section whether the prior policies or regulations are valid during the period of remand.

Position of the parties:

Citing to this provision of the GMA, the County argues that "when the Board invalidated [Emergency] Ordinance No. 04-057, the previously enacted land use designations were automatically revived by operation of law pursuant to the savings clause contained in the remanded ordinance." County Motion, at 3-4. The County contends that,

> The Board's determination of invalidity revived the prior [Plan] land use designations of Riverway Commercial Farmland and Rural Freeway Service and the prior zoning of Agriculture-10 and Rural Freeway Service. The Board has already confirmed that these designations and zoning are valid. *See* Order Rescinding Findings of Noncompliance and Invalidity.[3] Therefore, the Board should again find these designations and zoning valid pursuant to RCW 36.70A.302(4). There is absolutely no legal or practical justification for finding otherwise.

County Motion, at 4.

1000 Friends opposes the County's motion based upon the language of the severability clause and concern that the County would repeat the recent history of this matter.[4] 1000 Friends Answer, at 2. The basis for Petitioner's objection to the savings, or severability, clause is that it does not repeal Ordinance No. 03-063. Therefore, 1000 Friends argues, that this clause by its own terms, revives provisions in effect before adoption of

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[3] The full citation to the referenced Board's Order is, *1000 Friends of Washington, et al., v. Snohomish County*, CPSGMHB Case No. 03-3-0019c, Order Rescinding Finding of Noncompliance and Invalidity, (Apr. 9, 2004).

[4] 1000 Friends recaps the sequence of Board Orders from the issuance of the March 22, 2004 Final Decision and Order (**FDO**) through the Board's issuance of the June 24th Order. *See* 1000 Friends Answer, at 2.

Emergency Ordinance No. 04-057. Petitioner notes that the severability clause does not act to revive the Board's prior orders of invalidity. Petitioner suggests that the most recent provision in effect were those of Ordinance No. 03-063 which designated the Island Crossing area as being within the urban growth area and urban commercial. Therefore, 1000 Friends urges the Board to not rescind its present determination of invalidity. *Id.*, at 2-4.

In its answer, CTED states, "CTED does not oppose the new request for determination regarding the Agriculture-10 and Rural Freeway Service designations that applied to Island Crossing prior to the adoption of Ordinance 03-063, but CTED strongly opposes any attempt to use RCW 36.70A.302(4) to revive Ordinance 03-063." CTED Answer, at 3, (underlining in original).

The Flood Control District argues that the operation of Emergency Ordinance No. 04-057's severability clause would revive the provisions of Ordinance No. 03-063, and urges the Board to deny the County's motion. Flood Control District Answer, at 5.

Board discussion:

A brief recap of the Board's 2004 Orders[5] is in order prior to addressing this question.

- On March 22, 2004 the Board issued its "Final Decision and Order" in this matter. The FDO found that portions of Ordinance No. 03-063 related to specific designations[6] in the Island Crossing area did not comply with the GMA; substantially interfered with fulfillment of the goals of the Act and the Board entered a determination of invalidity. [De-designation of agricultural resource land and expansion of the Arlington UGA were the major issues that have been involved in this matter.]

- On April 9, 2004, the Board issued its "Order Rescinding Finding of Noncompliance and Invalidity. In its FDO, the Board had found Ordinance

[5] *See* the Board's 3/22/04 FDO, at 2-4, for a recap of the history of prior Board and Court cases involving the Island Crossing area.

[6] The Board found Ordinance No. 03-063 noncompliant and invalid for approximately 110.5 acres in Island Crossing; approximately 75.5 acres was changed from Riverway Commercial Farmland (Plan) to Urban Commercial (Plan) and the zoning for this area was changed from Agriculture-10 to General Commercial; also, approximately 35 acres was changed from Rural Freeway Service (Plan) to Urban Commercial (Plan) and the zoning was changed from Rural Freeway Service to General Commercial. All 110.5 acres were also included within the Arlington UGA. See, 3/22/04 FDO, at 40. Note that a "Corrected FDO" was issued on March 31, 2004 correcting format and typographical errors, but none affected the substance of the 3/22/04 FDO. *See also, Sky Valley, et al., v. Snohomish County*, CPSGMHB Case No. 95-3-0068c, Order on Compliance, (Apr. 23, 1999) [The Island Crossing area was removed from the Arlington UGA and designated as Riverway Commercial Farmland.]

No. 03-063 noncompliant and invalid. Pursuant to RCW 36.70A.302(4), and a savings clause in Ordinance No. 03-063, the County moved to revive the prior Plan designations of Riverway Commercial Farmland and Rural Freeway Service and the implementing zoning designations of Agriculture-10 and Rural Freeway Service. The Board's Order concluded that these prior designations complied with the Act and the Board consequently granted the County's motion.

- On June 1, 2004, the Board issued its "Order Rescinding the April 9, 2004 Order Rescinding Findings of Noncompliance and Invalidity." This Order was based upon the County's adoption of Emergency Ordinance No. 04-057, which removed the basis for the Board's April 9, 2004 Order Rescinding Finding of Noncompliance and Invalidity. Emergency Ordinance No. 04-057[7] adopted the same Plan and zoning designations that were found noncompliant and invalid in Ordinance No. 03-063.

- On June 24, 2004, the Board issued its "Order Finding Continuing Noncompliance and Continuing Invalidity and Recommendation for Gubernatorial Sanctions." Ordinance No. 04-057 was the subject of this Board Order.

The savings, or severability, clause in question provides:

> If any provision of this ordinance is held invalid or unconstitutional, such invalidity or unconstitutionality shall not affect the validity or constitutionality of the remainder of this ordinance. Provided however, that if any provision of this ordinance is held invalid or unconstitutional, then the provision in effect prior to the effective date of this ordinance shall be in full force and effect for that individual provision as if this ordinance had never been adopted.

Emergency Ordinance No. 04-057, Section 6.

The Board notes that the County has not initiated any legislative action to redesignate the affected lands to comply with the GMA, as interpreted in the Board's March 22, 2004 FDO; instead, the County merely took additional testimony and accepted new documents

[7] The Board notes that the maps accompanying Emergency Ordinance No. 04-057 (adopted May 24, 2004) state: Proposed Plan Amendment – Dwayne Lane: Redesignate Riverway Commercial Farmland and Rural Freeway Service to Urban Commercial [Map 7]; and Proposed Rezone – Dwayne Lane: Rezone from Rural Freeway Service and Agriculture -10 acre to General Commercial [Map 7a]. The Board also notes that that the WHEREAS's refer to the Board's March 22, 2004 FDO and the severability clause in Section 6 of Ordinance No. 03-063, but do not reference the Board's April 9, 2004 Order. Also, the Board's Order reinstating Invalidity was issued on June 1, 2004, after adoption of Emergency Ordinance No. 04-057.

to supplement its record and then adopted essentially the same designations the Board found noncompliant and invalid in the FDO.

In its current motion, the County suggests that the Board's June 24, 2004 Order with its determination of invalidity, and operation of the Ordinance's severability clause, revives the prior Plan and zoning designations[8] that existed for the Island Crossing area. But again, the County expresses no intent to take legislative action to designate the noncompliant lands to comply with the GMA as interpreted in the Board's June 24, 2004 Order. If, as the County contends, these are the prior Plan and zoning designations that have been found to comply with the GMA,[9] then the County should take legislative action to adopt these designations and repeal the conflicting provisions of Ordinance Nos. 03-063 and 04-057.

Undertaking such legislative action would remove any ambiguity or doubt regarding the County's Plan and zoning designations for the Island Crossing area. Specific legislative action to clearly establish the designations is important to provide clarity and certainty to the citizens of Snohomish County, since the maps and designations shown in an Ordinance are more readily apparent and relied upon than a severability clause which negates those same designations. Additionally, interested citizens would have to look beyond the face of the Ordinance to determine whether any of its provisions had been invalidated by this Board or a Court to determine whether the facial provisions of the Ordinance were, or were not, still effective. While severability clauses are certainly legal, their practical effect in the land use context is dubious without follow-up legislation to provide clarity and certainty.

As to the legal effect of the severability clause involved in the present situation, the County cites to no case law supporting its position (*i.e.* The designations prior to Ordinance No. 03-063 are revived; not the designations in Ordinance No. 03-063 which preceded 04-057.). Nor does the County cite to any case law construing a severability clause for a fact pattern as presented in this situation: 1) where ordinance designations have been found invalid; 2) where the invalidity of the designations have been rescinded pursuant to a severability clause and official action, thereby reviving prior designations; 3) where the invalidity of the designations have been reinstated due to adoption of a new ordinance adopting the same designations as were originally invalidated; 4) where the (same) designations in the new ordinance have been determined to be invalid; and 5) where the jurisdiction now seeks operation of a severability clause to revive "prior provisions."

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[8] The County indicates that these designations are: Riverway Commercial Farmland and Rural Freeway Service (Plan designations) and A – 10 and Rural Freeway Service (zoning designations).

[9] The Board does not dispute that the Riverway Commercial Farmland and Rural Freeway Service Plan designations and the A-10 and Rural Freeway Service zoning designations comply with the GMA. *See* the *Sky Valley* Order, noted in footnote 7, *supra*.

Likewise, 1000 Friends, CTED and the Flood Control District cite to no case law supporting their positions (i.e. the designations in Ordinance No. 03-063 are revived) and construing a severability clause for the fact pattern noted, *supra*.

The Board concludes that the effect of the operation of the severability clause is ambiguous and in doubt. Does the initial determination of invalidity, its rescission, its reinstatement act as an impediment to reviving the land use designations prior to the adoption of Ordinance No. 06-063? The Board has been cited to no authority conclusively answering this question. However, as discussed *supra*, to remove this ambiguity and doubt, and reflect the County's intent as indicated in its motion, its should take legislative action to reinstate prior GMA compliant designations and repeal provisions of Ordinance Nos. 03-063 and 04-057 that contradict and conflict with those designations. Such action would remove any ambiguity and doubt arising from the operation of the severability clause. Affirmative action such as this seems especially appropriate to provide certainty and clarity to the citizens of Snohomish County and where the County is facing a recommendation of Gubernatorial sanctions. Therefore, the Board **denies** the County's Motion for a Determination of Validity, pursuant to RCW 36.70A.302(4).

III. ORDER

Having reviewed the Board's June 24, 2004, June 1, 2004, April 9, 2004 and March 22, 2004 Orders, the Motions of the County, the Answers of Petitioners, the GMA, and having considered the arguments of the parties and deliberated on the matter, the Board ORDERS:

1. The County's Motion to Reconsider Finding of Fact 17 is **granted**, and is revised as set forth *supra*.

2. The County's Motion for a Determination of Validity pursuant to RCW 36.70A.302(4) is **denied**.

3. If it is the County's desire to have a Finding of Compliance entered, the Determination of Invalidity rescinded and the recommendation of Gubernatorial Sanctions withdrawn, the County should take legislative action to repeal the noncompliant and invalid Plan and zoning designations adopted in Ordinance Nos. 03-063 and 04-057 and adopt Plan and zoning designations that comply with the goals and requirements of the GMA, as interpreted in the noted Boards Orders.

4. A copy of this Order will be transmitted to the Governor, and the Board will take no further action on this matter until such time as the Governor or a court

directs, that the Board should notify the parties to this case and schedule further compliance proceedings.

So ORDERED this 22nd day of July 2004.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD[10]

Bruce C. Laing, FAICP
Board Member

Edward G. McGuire, AICP
Board Member

Note: This Order constitutes a final order as specified by RCW 36.70A.300.

[10] Having not participated with the Board in the Board's prior Orders in this matter, Board Member Pageler did not participate in this decision.

APPENDIX G

CENTRAL PUGET SOUND
GROWTH MANAGEMENT HEARINGS BOARD
STATE OF WASHINGTON

1000 FRIENDS OF WASHINGTON, STILLAGUAMISH FLOOD CONTROL DISTRICT, AGRICULTURE FOR TOMORROW, PILCHUCK AUDUBON SOCIETY; and THE DIRECTOR OF THE STATE OF WASHINGTON DEPARTMENT OF COMMUNITY, TRADE AND ECONOMIC DEVELOPMENT, Petitioners, v. SNOHOMISH COUNTY, Respondent, and DWAYNE LANE, Intervenor.	)	**Case No. 03-3-0019c** **[*Island Crossing*]** **ORDER WITHDRAWING THE RECOMMENDATION OF GUBERNATORIAL SANCTIONS, RESCINDING INVALIDITY AND FINDING COMPLIANCE**

I. BACKGROUND

On March 31, 2004, the Board issued its "Corrected Final Decision and Order"[1] in the above captioned case. That Order found Snohomish County's designation of the Island Crossing area noncompliant with the GMA and invalid.

On April 9, 2004, the Board issued its "Order Rescinding Findings of Noncompliance and Invalidity" in the above captioned case.

[1] The FDO was initially issued on March 22, 2004; the 3/31/04 corrected FDO corrected typographical errors and citations. *See* 3/31/04 Notice of Corrected Final Decision and Order, at 2.

On June 1, 2004, the Board issued its "Order Rescinding the April 9, 2004 Order Rescinding Findings of Noncompliance and Invalidity" in the above captioned case.

On June 24, 2004, the Board issued its "Order Finding Continuing Noncompliance and Continuing Invalidity and Recommendation for Gubernatorial Sanctions" in the above captioned case.

On July 22, 2004, the Board issued its "Order Granting Reconsideration [Revising Finding of Fact 17] and Denying Motion to Enter Determination of Validity Pursuant to RCW 36.70A.302(4)" in the above captioned case. The July 22, 2004 Order provided:

> A copy of this Order will be transmitted to the Governor, and the Board will take no further action on this matter until such time as the Governor or a court directs that the Board should notify the parties to this case and schedule further compliance proceedings.

7/22/04 Order, at 9-10.

Between July and December 2004, the Governor's Office communicated several times with Snohomish County regarding the County's compliance with the GMA and the possibility of gubernatorial imposed sanctions.

On December 27, 2004, via letter, the Governor advised Snohomish County that gubernatorial sanctions – withholding the County's share of motor vehicle excise taxes – would be imposed as of March 1, 2005. The Governor's letter noted that the County had taken no action to address noncompliance of the Island Crossing property with the Growth Management Act.

On January 5, 2005 the Board received a letter from the Governor's Office directing the Board to review an attached copy of Resolution 05-001 to determine whether it addressed the County's noncompliance with regard to the Island Crossing Property. Resolution 05-001 is entitled:

> ACTING TO COMPLY WITH THE ORDER FINDING CONTINUING NONCOMPLIANCE AND CONTINUING INVALIDITY AND RECOMMENDATION OF GUBERNATORIAL SANCTIONS ISSUED BY THE CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD IN CASE NO. 03-3-0019C CONCERNING PROPERTY AT ISLAND CROSSING.

Resolution 05-001, at 1.

II. BOARD DISCUSSION

The Board's July 22, 2004 Order stated:

> In its current motion, the County suggests that the Board's June 24, 2004 Order with its determination of invalidity, and operation of the Ordinance's severability clause, revives the prior Plan and zoning designations[2] that existed for the Island Crossing area. But again, the County expresses no intent to take legislative action to designate the noncompliant lands to comply with the GMA as interpreted in the Board's June 24, 2004 Order. If, as the County contends, these are the prior Plan and zoning designations that have been found to comply with the GMA [footnote omitted], then the County should take legislative action to adopt these designations and repeal the conflicting provisions of Ordinance Nos. 03-063 and 04-057.
>
> Undertaking such legislative action would remove any ambiguity or doubt regarding the County's Plan and zoning designations for the Island Crossing area. *Specific legislative action to clearly establish the designations is important to provide clarity and certainty to the citizens of Snohomish County, since the maps and designations shown in an Ordinance are more readily apparent and relied upon than a severability clause which negates those same designations. Additionally, interested citizens would have to look beyond the face of the Ordinance to determine whether any of its provisions had been invalidated by this Board or a Court to determine whether the facial provisions of the Ordinance were, or were not, still effective. While severability clauses are certainly legal, their practical effect in the land use context is dubious without follow-up legislation to provide clarity and certainty.*
>
> . . .
>
> The Board concludes that the effect of the operation of the severability clause is ambiguous and in doubt. Does the initial determination of invalidity, its rescission, its reinstatement act as an impediment to reviving the land use designations prior to the adoption of Ordinance No. 06-063? The Board has been cited to no authority conclusively answering this question. *However, as discussed supra,* ***to remove this ambiguity and doubt, and reflect the County's intent as indicated in its motion, it should take legislative action to reinstate prior GMA compliant designations*** *and repeal provisions of Ordinance Nos. 03-063 and 04-057 that contradict and conflict with those designations.* ***Such action would remove any ambiguity and doubt arising from the operation of the***

[2] The County indicates that these designations are: Riverway Commercial Farmland and Rural Freeway Service (Plan designations) and A – 10 and Rural Freeway Service (zoning designations).

> ***severability clause.*** *Affirmative action such as this seems especially appropriate to provide certainty and clarity to the citizens of Snohomish County and where the County is facing a recommendation of Gubernatorial sanctions.* Therefore, the Board **denies** the County's Motion for a Determination of Validity, pursuant to RCW 36.70A.302(4).

7/22/04 Order, at 8-9, (emphasis supplied).

Snohomish County's resolution states:

> WHEREAS, ***Snohomish County wishes to make clear its intentions that the land use designations on the Island Crossing property not be out of compliance and invalid with the Board rulings*** during the pendency of the court of appeals in the Island Crossing case.
>
> NOW, THEREFORE, IT IS RESOLVED that Snohomish County hereby states its intention that ***the property at Island Crossing retains the land use designations (Rural Freeway Service and Riverway Commercial Farmland on the comprehensive plan, and Rural Freeway Service and Agriculture – 10 Acre on the zoning map) that were in effect prior to the adoption of Amended Emergency Ordinance No. 04-057***, and that Snohomish County does not intend to take any further legislative action regarding the property unless and until the Board's holdings in Case No. 03-3-0019c are reversed by a court of competent jurisdiction.

Resolution 05-001, at 5, (emphasis supplied).

As expressed in the Board's prior Orders, for the County to achieve compliance, provide a basis for rescinding invalidity and withdrawal of the recommendation of sanctions, the Board sought: 1) specific legislative action by the County to remove any ambiguity or doubt related to the Island Crossing Plan and zoning designations; and 2) for the County to clearly reinstate the prior compliant land use plan and zoning designations in order to provide clarity and certainty to the citizens of Snohomish County regarding the Island Crossing property.

The Board finds that Snohomish County's adoption of Resolution 05-001 removes ambiguity and doubt so that property owners and others are not misled as to the effective Plan and zoning designations for the Island Crossing property. Resolution 05-001 clarifies and retains the Rural Freeway Service and Riverway Commercial Farmland designations in the comprehensive plan and retains the Rural Freeway Service and Agriculture – 10 Acre designations on the zoning map for the Island Crossing area that has been the subject of this appeal.

The Board concludes that Snohomish County's Resolution 05-001 reaffirms and retains previously determined GMA compliant comprehensive plan (Rural Freeway Service and Riverway Commercial Farmland) designations and previously determined GMA

compliant zoning designations (Rural Freeway Commercial and Agriculture 10 Acre) for the Island Crossing property.

Therefore, Snohomish County's adoption of Resolution 05-001 complies with the provisions of the Growth Management Act as reflected in the Board's Orders in this matter. Consequently, the Board will issue a Finding of Compliance and Rescind the Determination of Invalidity and Withdraw the Recommendation for Gubernatorial Sanctions.

III. ORDER

Having reviewed and considered Resolution 05-001, the Board's prior Orders in this matter, other Orders of this Board, having deliberated on the matter, and based upon the findings and conclusions noted above, the Board ORDERS:

1. Snohomish County's adoption of Resolution 05-001 removes ambiguity or doubt as to the plan and zoning designations for the Island Crossing property. Resolution 05-001 reaffirms and retains the Rural Freeway Service and Riverway Commercial Farmland comprehensive plan designations and the Rural Freeway Commercial and Agriculture 10 Acre zoning map designations for the Island Crossing property.

2. These comprehensive plan and zoning designations have been previously determined to comply with the provisions of the Growth Management Act. Therefore, the Board enters a Finding of Compliance for Snohomish County in this matter.

3. Additionally, by adopting Resolution 05-001, the County has removed the substantial interference with the goals 1, 2 and 8 [RCW 36.70A.020(1), (2) and (8). Therefore, the Board Rescinds the Determination of Invalidity for Snohomish County in this matter.

4. Finally, having entered a Finding of Compliance and Rescinded Invalidity, the Board withdraws its Recommendation for Gubernatorial Sanctions.

5. A copy of the Order shall be transmitted to the Governor.

So ORDERED this 6th day of January 2005.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

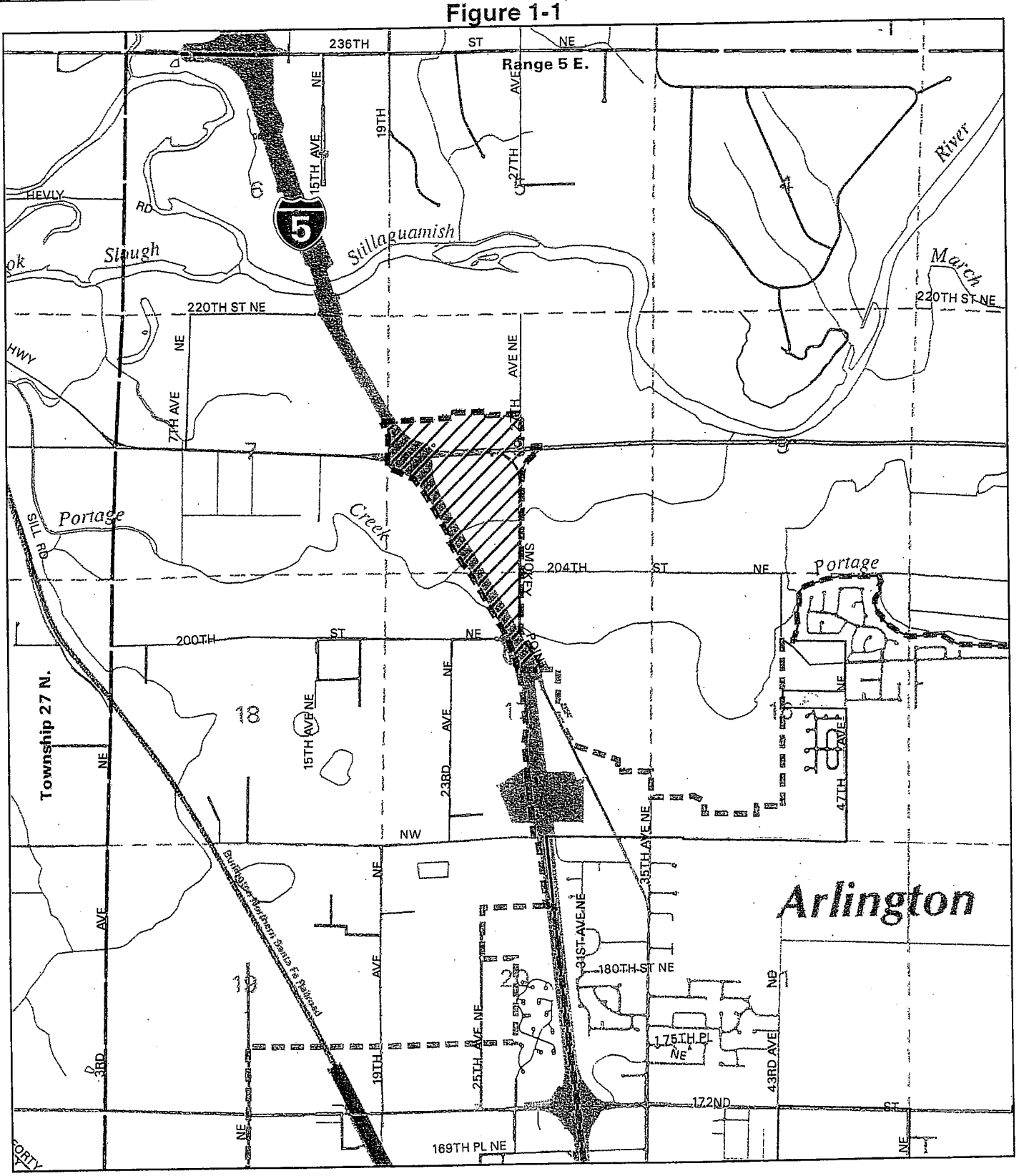
Bruce C. Laing, FAICP
Board Member

Edward G. McGuire, AICP
Board Member

Margaret A. Pageler
Board Member

APPENDIX H
MAPS & PHOTOGRAPHS

Figure 1-1



Snohomish County 2003 Docket
Vicinity Map
Dwayne Lane

Snohomish County

January 2003

LEGEND

Incorporated Cities

Existing Urban Growth Area Bdy.

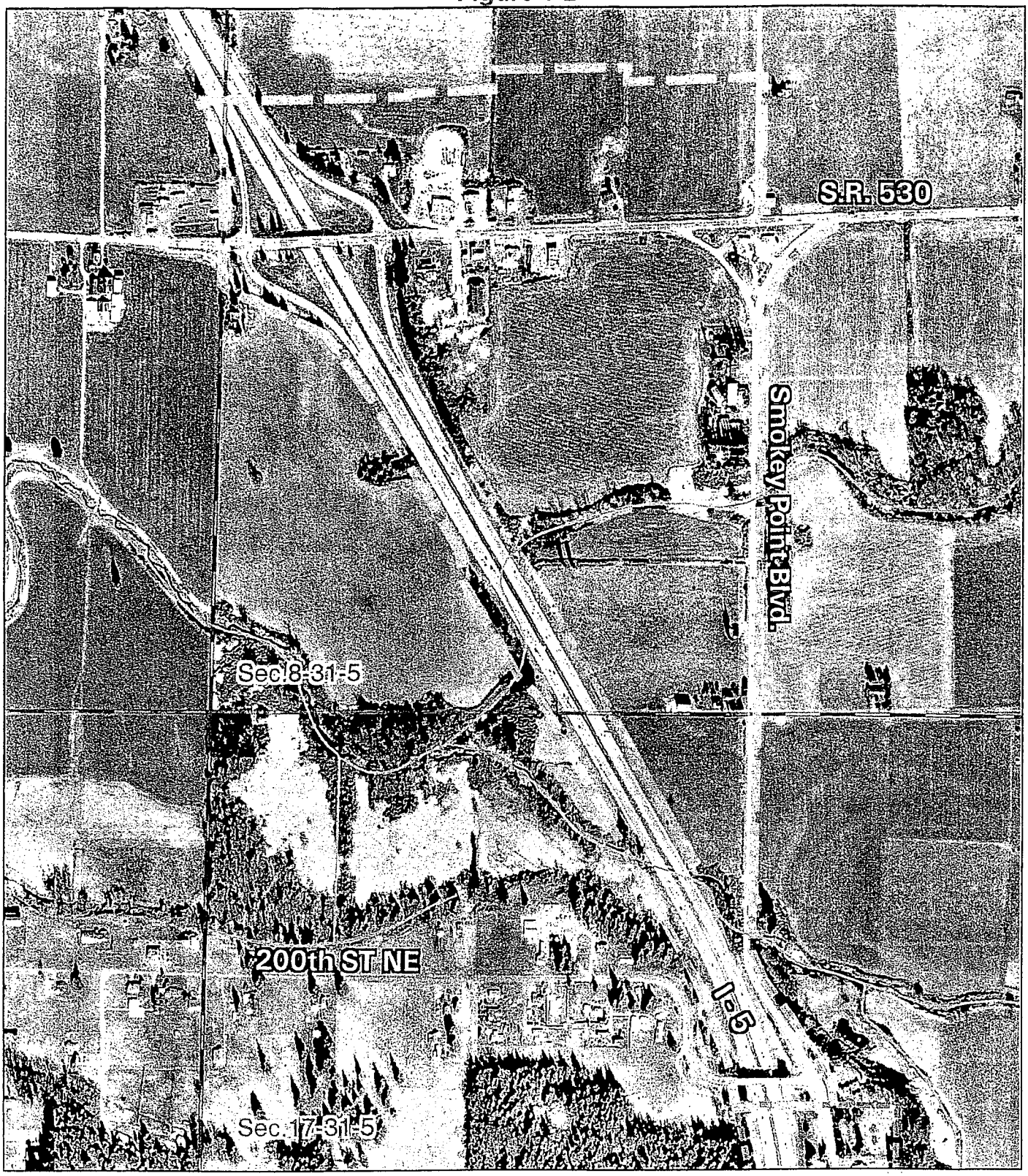
Proposal Site

This map is a graphic representation derived from the Snohomish County Geographic Information System. It does not represent survey accuracy. Produced by Snohomish County Planning Div., GIS Team;cbl; c:/dock/dock03/lane-vicinity_fig1-1.aml

Scale in Feet

0 1375 2750 4125

Figure 1-2



Snohomish County 2003 Docket

Proposed Comprehensive Plan Amendment

Dwayne Lane

Snohomish County

January 2003

LEGEND

2001 Aerial Photo

Docket Proposal

Incorporated Cities

Existing Urban Growth Area Bdy.

This map is a graphic representation derived from the Snohomish County Geographic Information System. It does not represent survey accuracy. Property lines are for illustrative purposes and depict only generalized parcels.
Produced by Snohomish County Planning Div., GIS Team;cbl;
c:/dock/dock03/lane_aerial.aml

Scale in Feet

0 350 700 1050